No. 00-5250

Supreme Court, U.S.
FILED
OCT 18 2000

In The

Supreme Court of the United States

WESLEY AARON SHAFER, JR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

JOINT APPENDIX

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Certiorari Granted September 26, 2000

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

May 15, 1997	Petitioner indicted for murder, attempted armed robbery and conspiracy.
May 20, 1997	State serves Notice of Intent to Seek the Death Penalty and Statutory Aggravating Circumstances
November 5, 1997	State serves Notice of Evidence in Aggravation of Punishment
January 12, 1998	Jury selection begins in Union County Court of General Sessions
January 18, 1998	Trial jury find petitioner guilty as charged
January 19, 1998	Penalty phase begins
January 21, 1998	Sentencing jury returns death sentence, and court imposes death sentence on petitioner.
May 8, 2000	South Carolina Supreme Court affirms convictions and death sentence
June 6, 2000	South Carolina Supreme Court grants stay of execution pending petition for writ of certiorari
July 14, 2000	Petition for writ of certiorari filed
September 26, 2000	Petition for writ of certiorari granted

STATE OF SOUTH CAROLINA)
) INDICTMENT
COUNTY OF UNION)

At a Court of General Sessions, convened on May 15, 1997, the Grand Jury of Union County present upon their oath:

MURDER

That Wesley Aaron Shafer did in Union County on or about April 13, 1997, with malice aforethought, kill one Luther Ray Broome by means of shooting him with a firearm and said victim died as a proximate result thereof, all in violation of Section 16-3-10, Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

/s/ T E Pope
SOLICITOR

STATE OF SOUTH CAROLINA)
) INDICTMENT
COUNTY OF UNION)

At a Court of General Sessions, convened on May 15, 1997, the Grand Jury of Union County present upon their oath:

ATTEMPTED ARMED ROBBERY

That Wesley Aaron Shafer did in Union County on or about April 13, 1997, while armed with a deadly weapon, to wit: a firearm, attempt to take from the person or presence of Luther Ray Broome, by means of force or intimidation goods or monies from Jordan's Hot Spot, located on Jonesville-Lockhart Highway in Union, South Carolina in violation of Section 16-11-330(B), Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

/s/ T E Pope
SOLICITOR

STATE OF SOUTH CAROLINA)
) INDICTMENT
COUNTY OF UNION)

At a Court of General Sessions, convened on May 15, 1997, the Grand Jury of Union County present upon their oath:

CRIMINAL CONSPIRACY

That Wesley Aaron Shafer did in Union County on or about April 13, 1997, wilfully and unlawfully unite, combine, conspire, confederate, agree and have tacit understanding with Joseph Adam Mullinax, Justin Matthew Porter, and/or other persons whose names are unknown to these Grand Jurors, for the purpose of committing the Armed Robbery and/or Murder of one Luther Ray

Broome, all in violation of Section 16-17-410 of the Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

/s/ T E Pope
SOLICITOR

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF UNION	)	

STATE OF SOUTH CAROLINA	)	NOTICE OF INTENT TO SEEK THE DEATH PENALTY AND STATUTORY AGGRAVATING CIRCUMSTANCES
vs.	)	
WESLEY AARON SHAFER,	)	
Defendant.	)	(Filed May 20, 1997)

Pursuant to Section 16-3-26(A) of the Code of Laws of South Carolina (1976, as amended), take notice that the State of South Carolina intends to seek the death penalty in the above captioned case wherein the Defendant, Wesley Aaron Shafer, is charged with Murder.

The State of South Carolina pursuant to Section 16-3-20(B) of the Code of Laws of South Carolina (1976, as amended) hereby gives notice of the following aggravating circumstances:

the Murder was committed while in the commission of:

(1) robbery while armed with a deadly weapon 16-3-20(C)(a)(1)(d)

(2) larceny with use of a deadly weapon 16-3-20(C)(a)(1)(e)

5/20, 1997
Union, South Carolina

/s/ T E Pope
Thomas E. Pope, Solicitor
Sixteenth Judicial Circuit

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF UNION	)	SIXTEENTH JUDICIAL CIRCUIT

THE STATE	)	NOTICE OF EVIDENCE IN AGGRAVATION OF THE PUNISHMENT
V.	)	
WESLEY AARON SHAFER,	)	Indictment # 97-GS44-419, 420, 421
Defendant.	)	(Filed Nov. 5, 1997)

TO: WESLEY AARON SHAFER AND HIS ATTORNEYS OF RECORD, WILLIAM ALL, ESQ. AND LEON BANKS, ESQ.:

PLEASE TAKE NOTICE pursuant to Section 16-3-20(B) of the Code of Laws of South Carolina (1976, as amended), that during the guilt phase or during any sentencing proceeding conducted in the above-entitled

capital murder case to determine whether the Defendant Wesley Aaron Shafer, should be sentenced to death or life imprisonment, the State will seek to introduce as evidence in aggravation of the punishment to be imposed upon the Defendant the evidence as listed herein below:

(1) The murder was committed while in the commission of the crime of armed robbery. Code of Laws of South Carolina, (1976, as amended), Section 16-3-20 (C)(a)(1)(d).

(2) The murder was committed while in the commission of the crime of larceny with use of a deadly weapon. Code of Laws of South Carolina (1976, as amended), Section 16-3-20(C)(a)(1)(e).

The State will further present as evidence in the second or sentencing trial all items of evidence, testimony and exhibits that were admitted during the first or guilt phase.

The State will present any and all evidence relating to prior bad acts and other evidence relating to the Defendant's character occurring at any time prior to the conclusion of the case. This shall include evidence as to the Defendant's adult and juvenile character, mentality, background, prior and subsequent adult and juvenile acts of violence, adult and juvenile crimes and sentences, and other unlawful conduct, prior and subsequent adult and juvenile violations of laws, rules, regulations and/or ordinances, prior and subsequent criminal adult and juvenile records and sentences, the nature and impact of said crimes, propensity to commit or attempt to commit acts of violence or bodily harm as an adult and a juvenile, propensity for violence and unlawful conduct as an adult and a juvenile, disregard for peace and good order as an

adult and a juvenile, and other similar characteristics of Wesley Aaron Shafer, as an adult and a juvenile, by the testimony of victims, witnesses, police officers, statements by the defendant and other relevant testimony, photographs and exhibits. *Lockett v. Ohio*, 438 U.S. 586 (1978); *State v. Shaw*. 255 S.E.2d 799 (1979).

The State will further present evidence of circumstances surrounding the crimes herein and the characteristics of Wesley Aaron Shafer, who committed the crimes. Evidence will also be presented to show the cause and/or manner in which the murder and crimes were committed, including, but not limited to, photographs, videotapes, other tapes, diagrams of the crime scene and victims, and testimony related thereto, including statements by the Defendant. *State v Goolsby*, 268 S.E.2d 31 (1980); *State v. Shaw, supra*.

The State will further present evidence, testimony and exhibits as to the Defendant's character and conduct while incarcerated in jails and/or prisons as an adult and a juvenile and disciplinary actions; disregard and violations of rules, regulations, laws and/or ordinances as an adult and a juvenile and disciplinary actions; disrespectful, disruptive and uncooperative actions and conduct as an adult and a juvenile; and all other such acts and conduct while incarcerated as an adult and a juvenile and disciplinary actions.

The State will further present evidence, testimony and exhibits as to the Defendant's character, statements and conduct relating to his release or parole from jails

and/or prisons as an adult and a juvenile and probationary status; mental or physical evaluations of the Defendant as an adult and a juvenile; opinions as to the Defendant's character, propensity for violence and unlawful conduct, disregard for peace and good order and to commit such acts in the future.

The State will further present detailed evidence of circumstances surrounding the arrest and apprehension of Wesley Aaron Shafer, including but not limited to weapons, photographs, recordings, diagrams, exhibits, statements by the defendant and testimony related thereto.

The State will further present any and all evidence concerning "victim impact" evidence relating to Luther Ray Broome's personal characteristics and the emotional impact of the crimes on the family and friends of the victim, the consequences of the crimes on the family and friends of the victim and arguments relating thereto pursuant to *Payne v. Tennessee*, 111 S.Ct. 2597 (1991) and *State v. Rocheville*, 425 S.E.2d 32 (1993); *Lucas v. Evatt*, 416 S.E.2d 646 (1992); and *State v. Johnson*, 410 S.E.2d 547 (1991).

/s/ T E Pope
THOMAS E. POPE, SOLICITOR
SIXTEENTH JUDICIAL CIRCUIT

Union, South Carolina
November 5, 1997

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS
SIXTEENTH JUDICIAL CIRCUIT

[Caption Omitted In Printing]

Motions Hearing, Jan. 12, 1998

* * *

[99] **THE COURT:** YES, SIR. ALL RIGHT, LET'S GO AHEAD AND DO THAT WHILE WE ARE BACK HERE. I HAVE A FAIRLY STANDARD JUROR TYPE LIST THAT LISTS THREE TYPES OF JURORS. I WILL MAKE THIS COPY A COPY OF RECORD. I AM GOING TO PUT SIX IN THE JURY ROOM FOR THE JURORS TO REVIEW SO WHEN THEY COME OUT WE CAN DISCUSS IT. COUNSEL FOR THE DEFENDANT, AS I UNDERSTAND IT, DOES NOT OBJECT, AS I UNDERSTAND IT, TO THE EXHIBIT PER SE, BUT RATHER TO THE LANGUAGE IN THE LAST BASICALLY TWO SENTENCES. ONE IS A VERY, VERY LONG SENTENCE.

WE HAVE HEARD THE POSITION OF THE DEFENSE AND THE [100] STATE ADDING THE WORDS AT THE BOTTOM INSTEAD OF LIFE IMPRISONMENT, LIFE IMPRISONMENT WITHOUT PAROLE. AND WHAT WAS THE OTHER THING YOU WANTED TO PUT IN?

MR. BANKS: THAT'S ALL.

THE COURT: I'M JUST TRYING TO MAKE SURE.

MR. BANKS: YES, SIR, THAT'S CORRECT. AND, YOUR HONOR, SINCE THIS IS A CAPITAL CASE, WE NEED TO PUT ON THE RECORD THE BASES FOR

ALL OF OUR OBJECTIONS. MY FEELING IS THAT THIS CHARACTERIZATION OF THE THREE TYPE OF JURORS FOR PURPOSES OF VOIR DIRE WERE FAIRLY STANDARD BOILER PLATE LANGUAGE PRIOR TO THE CHANGE IN THE STATUTE REGARDING LIFE WITHOUT PAROLE, AND THERE HAS BEEN NO CHANGE IN THOSE TYPE OF JURORS SUBSEQUENT TO THE STATUTE THAT ALLOWS LIFE WITHOUT PAROLE. AND BECAUSE THE THIRD TYPE OF JUROR IS TOLD AGGRAVATORS AND MITIGATORS AND THAT YOU MAY FIND AGGRAVATORS OR YOU MAY FIND MITIGATORS, YOU MAY CONSIDER THOSE, IT SEEMS TO ME THE LAW IS UNDER THE STATUTE THAT THERE IS A POSSIBILITY OF LIFE WITHOUT PAROLE, AND THAT IS A DIFFERENT ISSUE THAN LIFE MEANS LIFE BECAUSE YOU'RE TRYING TO IDENTIFY JURORS FOR PURPOSES AT [sic] VOIR DIRE FOR BIAS AND PREJUDICE, AND TO IDENTIFY THE JURORS AS INFLEXIBLE AS TO THE DEATH PENALTY OR INFLEXIBLE AS TO LIFE, I THINK IT IS ONLY PROPER TO EXPLAIN TO THEM ALL OF THE OPTIONS THAT THEY MAY END UP WITH, DEPENDING ON THE OUTCOME OF THE CASE. AND IT WOULD BE IMPROPER FOR PURPOSES OF VOIR DIRE TO LIMIT THAT TO LIFE OR [101] DEATH.

SO, MY SPECIFIC REQUEST WAS THAT THE LAST SENTENCE READ LIFE IMPRISONMENT, COMMA, LIFE WITHOUT PAROLE, COMMA, OR THE IMPOSITION OF THE DEATH PENALTY.

THE COURT: ANYTHING, MR. SOLICITOR?

MR. POPE: MAY IT PLEASE THE COURT, YOUR HONOR, THIS PARTICULAR QUESTIONNAIRE HAS BEEN USED – THE DEFENSE IS TALKING ABOUT THE CHANGE IN THE STATUTE, BUT I THINK THE ISSUE OF WHETHER OR NOT LIFE IS WITHOUT PAROLE OR WHAT SHOULD BE TOLD TO THE JURY IN THAT REGARD SHOULD BE HANDLED AT THE CLOSE OF THE CASE PER THE JUDGE'S INSTRUCTIONS. IT WOULD PARTIALLY BE BASED ON SIMMONS, AND WHETHER OR NOT THEY MADE A DANGEROUS ARGUMENT, AND BASED ON THAT I WOULD REQUEST THAT YOU USE THE QUESTIONNAIRE THAT HAS BEEN USED IN THE PAST.

THE COURT: MY RESPONSE TO THAT IS, THAT IS LIMITED TO THE 12 THAT'S GOING TO DECIDE. THE PURPOSE OF THOSE THREE PARAGRAPHS IS FOR VOIR DIRE FOR THEM TO DISTINGUISH WHAT THEY CAN OR CAN'T DO.

MR. BANKS: I THINK IT IS VERY CLEAR FROM PAST HISTORY IN DEATH PENALTY CASES, IN CAPITAL CASES, THAT THE QUESTION OF WHETHER YOU CAN GET LIFE WITHOUT PAROLE IS RELEVANT FOR THE VOIR DIRE. SOMEBODY THAT MAY CAN'T GIVE THE DEATH PENALTY, WHO WOULD OTHERWISE BE DISQUALIFIED, MAY HAVE A DIFFERENT OPINION IN VIEW OF LIFE WITHOUT PAROLE. AND THAT'S THE PURPOSE FOR BEING ABLE TO IDENTIFY THOSE AT ALL.

[102] **THE COURT:** I'M GOING TO SUBMIT IT AS IT IS DRAFTED.

* * *

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSION
SIXTEENTH JUDICIAL CIRCUIT

[Caption Omitted In Printing]

(EXHIBIT "B")

[MEMORANDUM FROM THE COURT
TO PROSPECTIVE JURORS, JAN. 12, 1998]

THERE IS A TYPE OF JUROR WHO, ONCE THE CRIME OF MURDER HAS BEEN PROVED BY THE STATE AND THE JUROR IS CONSIDERING PUNISHMENT, FEELS THAT HE OR SHE IS REQUIRED TO GIVE THE DEATH PENALTY IN EACH AND EVERY CASE. THIS JUROR SIMPLY FEELS THAT ONCE A MURDER HAS BEEN COMMITTED, THE DEATH PENALTY IS THE MOST APPROPRIATE PUNISHMENT NO MATTER WHAT THE CIRCUMSTANCES OF THE CASE.

THE SECOND TYPE OF JUROR IS ONE WHO, ALTHOUGH THE GUILT OF THE DEFENDANT HAS BEEN DETERMINED, UNDER NO CIRCUMSTANCES COULD EVER GIVE THE DEATH PENALTY. THIS JUROR WOULD NOT NEED TO HEAR WHAT THE FACTS AND CIRCUMSTANCES IN AGGRAVATION IN THIS PARTICULAR CASE WERE BECAUSE THE JUROR WOULD HAVE HIS OR HER MIND MADE UP CONCERNING PUNISHMENT NO MATTER WHAT HE OR SHE HEARD.

THE THIRD TYPE OF JUROR IS ONE WHO, ALTHOUGH THE GUILT OF THE DEFENDANT HAS BEEN DETERMINED, WOULD NOT HAVE HIS OR HER

MIND MADE UP IN ADVANCE CONCERNING PUNISHMENT. THIS JUROR WOULD NEED TO HEAR THE FACTS AND CIRCUMSTANCES IN AGGRAVATION AND IN MITIGATION, AND WOULD WANT TO LISTEN TO AND FOLLOW THE LAW AS THE JUDGE CHARGES THE JURY, BEFORE HE OR SHE COULD MAKE THE DECISION REGARDING PUNISHMENT, AND IF THE FACTS PRESENTED SO WARRANTED, THIS JUROR COULD BRING IN A VERDICT OF LIFE IMPRISONMENT. ALSO, IF THE FACTS PRESENTED SO WARRANTED, THE JUROR COULD BRING IN A VERDICT FOR THE DEATH PENALTY.

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS
SIXTEENTH JUDICIAL CIRCUIT

[Caption Omitted In Printing]

TRIAL TRANSCRIPT

MARSHALL OWINGS – DIRECT BY MR. BRACKETT

* * *

[962] **MR. BRACKETT:** YOUR HONOR, AT THIS TIME I WOULD [963] LIKE TO PUBLISH THE FIRST PORTION OF THIS TAPE, AND I'LL PLAY IT THROUGH THE ENTIRE TAPE.

THE COURT: YOU MAY PROCEED.

(THE VIDEO TAPE WAS SHOWN TO THE JURY)

* * *

[965] **MR. BRACKETT:** YOUR HONOR, AT THIS TIME I WOULD PROCEED TO PUBLISH THE OTHER HALF OF THE VIDEO.

THE COURT: YES, SIR.

(THE VIDEO WAS PLAYED FOR THE JURY)

* * *

MONICA INMAN – DIRECT BY MR. POPE

[1032] A. IT WAS A BLACK FEMALE; I DIDN'T KNOW HER.

Q. AND WHAT DID YOU DO THEN; WHERE WAS JAMIE AT THAT POINT?

A. JAMIE WAS STILL IN THE STORE. WHEN I LOOKED UP, AND NOTICED THEY WASN'T THERE, ME AND JENNIFER GOT OUT OF THE CAR. THE BLACK GIRL WAS GETTING OUT OF HER CAR AND GOING IN THE STORE. I JUST REMEMBER ASKING HER OR TELLING HER THAT SOMETHING WAS WRONG, NOT TO GO IN THE STORE. ANYWAY, WE ALL WENT IN THE STORE. JAMIE WAS ON THE PHONE AT THIS TIME.

Q. TELL THE JURY WHAT YOU SAW WHEN YOU ENTERED THE STORE.

A. WHEN I ENTERED THE STORE, JAMIE WAS ON THE PHONE CRYING. I LOOKED OVER THE COUNTER AND SEEN RAY BROOME ON THE FLOOR.

Q. AND AT THAT POINT, WHAT DID YOU DO THEN?

A. I LOOKED OVER THE COUNTER AND THEN I LIKE JUMPED BACK.

AND JENNIFER WAS UPSET, AND I TOLD JENNIFER NOT TO LOOK, AND THEN WE WENT OUTSIDE, GOT IN THE CAR AND RODE DOWN THE ROAD TO TRY TO GET HELP OR SOMETHING BECAUSE AT THE TIME IT DIDN'T DAWN ON US – WE KNEW JAMIE WAS ON THE PHONE, BUT WE WERE REALLY NERVOUS AND UPSET.

* * *

[1178] **JOSEPH ADAM MULLINAX – DIRECT BY MR. BRACKETT**

* * *

Q. ADAM, HAVE ANY PROMISES BEEN MADE TO YOU?

A. NO, SIR.

Q. REGARDING YOUR PENDING CHARGES?

A. NO, SIR, THEY HAVE NOT.

Q. ANY DEALS OF ANY SORT WHATSOEVER?

A. NONE WHATSOEVER.

Q. BY ANY LAW ENFORCEMENT AGENCY AT ALL INVOLVING THIS CASE, INCLUDING THE SOLICITOR'S OFFICE?

MR. BANKS: YOUR HONOR, ASKED AND ANSWERED.

THE COURT: I SUSTAIN THE OBJECTION.

Q. WHY ARE YOU TESTIFYING, ADAM?

A. THE REASON I'M TESTIFYING –

MR. BANKS: OBJECTION TO THE RELEVANCE, YOUR HONOR.

THE COURT: I SUSTAIN THE OBJECTION.

MR. POPE: YOUR HONOR, COULD WE APPROACH ON A MATTER OF LAW?

THE COURT: WELL, LET'S LET THE JURY GO OUT.

IN CAMERA:

MR. POPE: MAY IT PLEASE THE COURT, YOUR HONOR?

[1179] **THE COURT:** YES, SIR, EXCEPT I BELIEVE THIS IS MR. BRACKETT'S WITNESS.

MR. POPE: YES, SIR.

THE COURT: BUT I'LL BE GLAD TO HEAR FROM YOU, NOBODY IS OBJECTING.

MR. POPE: YOUR HONOR, THE OBJECTION IS THAT HIS CREDIBILITY IS NOT IN ISSUE. ANY TIME A WITNESS TAKES THE STAND – IF THAT IS THE CASE, THEN HE WOULDN'T QUESTION HIS CREDIBILITY, AND THAT'S CERTAINLY NOT THE CASE.

THE COURT: CREDIBILITY IS AN ISSUE, BUT YOU'RE ASKING WHY HE IS TESTIFYING.

MR. POPE: YES, SIR. THAT IS CLEARLY RELEVANT FOR THE JURY'S UNDERSTANDING OF HOW TO TAKE HIS TESTIMONY. WHY IS HE HERE TODAY? BECAUSE IT IS ALREADY CLEAR ON THE RECORD THAT HE IS A CO-DEFENDANT, AND HAS BEEN CHARGED, AND THEY'RE GOING TO SAY WELL THERE'S GOT TO BE SOME REASON HE'S HERE. I THINK CLEARLY IT'S ADMISSIBLE FOR HIS CREDIBILITY TO TELL THE JURY WHY HE HAS DECIDED TO COME FORWARD, YOUR HONOR.

THE COURT: MR. BANKS? OR WHOEVER IS APPROPRIATE.

MR. BANKS: THANK YOU, YOUR HONOR. YOUR HONOR, THERE IS NOT ANY CREDIBILITY IN ISSUE UNTIL SOME TYPE OF IMPEACHMENT. THIS WITNESS IS TESTIFYING UNDER OATH. HIS CREDIBILITY IS WHATEVER THE JURY ASSUMES IT TO BE. THEY ARE CERTAINLY VERY PROPER QUESTIONS FOR REDIRECT, BUT AT THIS POINT – I MEAN THAT'S LIKE ASKING HIM TO –

[1180] **THE COURT:** IT'S LIKE TRYING TO BOLSTER THE WITNESS BEFORE HIS CREDIBILITY IS EVEN IMPEACHED.

MR. BANKS: YES, SIR.

THE COURT: WHAT IF YOU ASKED THIS QUESTION, AND HE WERE NOT TO ASK ANY QUESTIONS AT ALL?

MR. BRACKETT: YOUR HONOR, I'VE ALWAYS PROCEEDED UNDER THE ASSUMPTION THAT YOU CAN – I'VE NEVER ENCOUNTERED THIS OBJECTION BEFORE. I AM RESPONSIBLE FOR THIS WITNESS' CREDIBILITY. BY CALLING HIM TO THE STAND, I VOUCHED FOR HIS CREDIBILITY. AND I HAVE TO ESTABLISH, AND HELP ESTABLISH HIS CREDIBILITY TO THIS JURY, AND I DO THAT BY ASKING HIM QUESTIONS, AND I SUBMIT THE PREVIOUS QUESTION REGARDING WHY HE –

THE COURT: WELL, IF YOU VOUCHED FOR HIS CREDIBILITY BY CALLING HIM, WHY DO YOU HAVE TO PROVE IT?

THE COURT: WELL, YOUR HONOR, THAT'S A TECHNICAL TERM FOR IT; I HAVE TO PROVE

EVERYTHING TO THIS JURY; THAT'S MY DUTY, IT'S MY BURDEN, INCLUDING HIS CREDIBILITY. I HAVE TO PROVE TO THIS JURY THAT WHAT HE IS SAYING IS BELIEVABLE, AND PRESENT EVIDENCE TO THEM, ANY RELEVANT EVIDENCE THAT IS PROBATIVE ON THE ISSUE OF HIS CREDIBILITY, INCLUDING THE EXISTENCE OR NON-EXISTENCE OF ANY DEALS.

THE COURT: YOU'VE ALREADY ASKED HIM ABOUT THAT.

MR. BRACKETT: YES, SIR. AND RIGHT ON THE HEELS OF THE QUESTION ABOUT A DEAL, IS THE NEXT MOST OBVIOUS QUESTION [1181] IF YOU'RE CHARGED WITH A CAPITAL MURDER OR IF YOU ARE CHARGED WITH A CRIME THAT HAS THE POTENTIAL –

THE COURT: DID I MISS SOMETHING? IS HE CHARGED WITH A CAPITAL MURDER?

MR. BRACKETT: HE IS CHARGED WITH A POTENTIAL CAPITAL MURDER; THERE IS NO CAPITAL MURDER CHARGE PENDING AGAINST HIM, HE'S CHARGED WITH MURDER. BUT IF YOU'RE CHARGED WITH MURDER, THEN THE OBVIOUS QUESTION THAT EXISTS IN THE MINDS OF EVERYONE OF THESE JURORS IS WHY IS HE UP HERE TESTIFYING. IF HE HASN'T BEEN GIVEN A DEAL, WHAT IS THE REASON THAT ADAM MULLINAX HAS CHOSEN TO COME INTO COURT AND TESTIFY AGAINST HIS RELATIVE IN REGARDS TO THIS CASE. I THINK IT'S PROPER FOR ME TO BRING THAT OUT IN ORDER FOR THEM TO PROPERLY UNDERSTAND, AND EVALUATE

HIS CREDIBILITY, AND THE TESTIMONY HE HAS GIVEN.

THE COURT: MR. BANKS, ANYTHING FURTHER?

MR. BANKS: YES, YOUR HONOR. I WOULD ONLY SAY THE ONLY REASON HIS CREDIBILITY WOULDN'T BE ACCEPTED BY THE JURY IS BECAUSE HE IS CHARGED WITH MURDER, ARMED ROBBERY AND CONSPIRACY, WHICH THEY HAVE CHARGED HIM WITH. THEY HAVE PLACED HIS CREDIBILITY IN ISSUE BY THE CHARGE, AND NOW THEY ARE TRYING WITH THE SAME WITNESS TO BOLSTER IT, TO SAY HE'S STILL OKAY, HE'S STILL CREDIBLE. AND UNTIL WE ASK QUESTIONS ON THAT, IT ISN'T RELEVANT.

THE COURT: I SUSTAIN THE OBJECTION. IF THEY GO [1182] INTO IT ON CROSS, YOU CAN CERTAINLY GO INTO IT ON REDIRECT.

MR. BRACKETT: ALL RIGHT. WHILE THE JURY IS OUT, I WOULD LIKE TO ADDRESS ONE OTHER ISSUE REGARDING THIS WITNESS' TESTIMONY BECAUSE I AM DONE IF I'M NOT ALLOWED TO ASK HIM THAT QUESTION, BUT I ANTICIPATE IMPEACHMENT, AND THIS IS A MOTION IN LIMINE BECAUSE THERE WOULD BE NO CURE ONCE THEY ASK THE IMPEACHING QUESTION, YOU'RE FACING LIFE IN PRISON WITHOUT PAROLE ON THE MURDER CHARGE. THAT EVIDENCE WOULD THEN BE TO THE JURY. THERE HAS BEEN NO TESTIMONY OF ANY DEAL. THERE HAS BEEN TESTIMONY, AS A MATTER OF FACT, AFFIRMATIVE TESTIMONY THAT THERE IS

NO DEAL, AND THEY ARE NOT ALLOWED TO EXPLORE AT RANDOM, BY WAY OF EXPLORING EDUCATING THE JURY AS TO THE NON-EXISTENCE OF PAROLE ELIGIBILITY DURING IMPEACHMENT ON CROSS EXAMINATION OF THIS WITNESS. AND I WOULD OBJECT IN LIMINE TO THEM DOING ANYTHING MORE THAN ASKING –

THE COURT: DO I UNDERSTAND THAT YOU'RE ASKING THEM TO NOT ASK A QUESTION THAT HAS A TRUE ANSWER JUST BECAUSE THE ANSWER MAY BE DETRIMENTAL TO YOUR POSITION?

MR. BRACKETT: NO, SIR. I'M SAYING THAT THEY ARE ENTITLED FIRST, AND I THINK THERE IS CASE LAW ON THIS POINT.

THE COURT: WELL, YOU BETTER FIND IT.

MR. BRACKETT: YES, SIR, I'LL LOOK FOR IT.

THE COURT: WELL, I DON'T KNOW WHEN YOU'RE GOING TO DO IT BECAUSE THE WITNESS IS ON THE STAND RIGHT NOW.

[1183] **MR. BRACKETT:** WELL, I WOULD ASK FOR A BREAK THEN TO FIND THAT.

THE COURT: YOU'RE GOING TO FIND ME SOME LAW THAT SAYS THAT THEY CAN'T GO INTO EVERYTHING HE'S FACING IN REGARD TO THIS SAME OFFENSE?

MR. BRACKETT: I'M SAYING THAT ONCE THEY HAVE ASKED HIM HAVE YOU BEEN PROMISED ANY DEALS OR MADE ANY PROMISES OF ANY

NATURE REGARDING YOUR PENDING CHARGES IN EXCHANGE FOR YOUR TESTIMONY HERE TODAY, THE MINUTE HE SAYS NO – THEY CAN ASK HIM, YOU HOPE FOR SOME LENIENCY, BUT THEY CANNOT GO INTO THE SPECIFICS OF THE POTENTIAL SENTENCE HE FACES ON THOSE CHARGES ONCE HE SAYS THERE IS NO DEAL. HE WOULD HAVE TO SAY YES, THERE IS A DEAL, AND THEN THE SENTENCE BECOMES RELEVANT; THEN THE SENTENCE THAT HE FACES BECOMES RELEVANT TO EXPLORE HIS CREDIBILITY, BECAUSE THEN IT BECOMES IMPORTANT TO THE JURY TO REALIZE WHAT HIS EXPOSURE IS, BUT IF THERE IS NO DEAL –

THE COURT: HOW LONG DO YOU NEED TO FIND THAT LAW?

MR. NETTLES: YOUR HONOR, I CAN GIVE YOU SOME LAW TO THE CONTRARY ON THAT. STATE VERSUS BROWN, 303 SOUTH CAROLINA 169, 1991; DAVIS VERSUS ALASKA, 415 U.S. 308; STATE VERSUS FARLAND, 279 SOUTH CAROLINA 327; AND STATE VERSUS COLLINS, 253 SOUTH CAROLINA '65.

THE COURT: LET ME SEE THEM. ALL RIGHT, WE WILL TAKE A BREAK AND YOU GET YOUR CASES, MR. NETTLES, AND MR. [1184] BRACKETT, YOU GET YOUR'S. [sic] I'M GOING TO LET YOU STEP DOWN, MR. MULLINAX. YOU CAN JUST GO BACK AND SIT WITH YOUR ATTORNEY. YOU'RE UNDER OATH, AND YOU'RE SUBJECT TO BEING CROSS EXAMINED, SO YOU CAN'T DISCUSS YOUR TESTIMONY. WELL, I TELL YOU WHAT. WHY DON'T YOU JUST HAVE A SEAT OVER THERE IN THE JURY

BOX FOR RIGHT NOW. IF YOU NEED TO GO TO THE REST ROOM OR SOMETHING, WE'LL HAVE SOMEBODY TO HELP YOU WITH THAT.

(AFTER THE BREAK)

THE COURT: YOU CAN COME UP HERE AND HAVE A SEAT. NOW, WHEN I LEFT THE ROOM THERE WAS A MOTION PENDING. I HAVE DONE SOME RESEARCH AND I HAVE ALSO TALKED TO COUNSEL. IT IS MY UNDERSTANDING THAT WE HAVE BASICALLY REACHED AN UNDERSTANDING THAT THE WITNESS MAY BE ASKED QUESTIONS CONCERNING THE CHARGES PENDING AGAINST HIM, BUT NOT AS TO ANY POTENTIAL PUNISHMENT TO THE EXTENT IT WOULD INCLUDE OR EXCLUDE PAROLE ELIGIBILITY. IS THAT CORRECT?

MR. BRACKETT: YES, SIR.

THE COURT: IS THAT CORRECT?

MR. BANKS: YES, SIR.

THE COURT: ALL RIGHT, BRING IN THE JURY.

IN THE PRESENCE OF THE JURY:

THE COURT: MR. BRACKETT?

MR. BRACKETT: YOUR HONOR, THAT'S ALL THE QUESTIONS I HAVE OF THIS WITNESS.

THE COURT: MR. NETTLES?

[1185] **MR. NETTLES:** WE HAVE NO QUESTIONS OF THIS WITNESS, YOUR HONOR.

* * *

[1240] **JENNIFER MARTIN – CROSS BY MR. POPE**

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Q. IF I COULD STOP YOU JUST A SECOND. YOU'RE STILL IN THE BACK SEAT OF THE CAR AND YOU'RE PULLED UP TO THE FRONT OF THE STORE; IS THAT RIGHT?

A. UH HUH.

Q. AND YOU'RE LOOKING AND YOU SEE JAMIE PALMER'S FACE TURNED BACK TOWARDS YOU; IS THAT RIGHT?

A. YES.

Q. AND THEN TELL THE JURY WHAT HAPPENED?

A. I BELIEVE, IF I'M NOT MISTAKEN, I BELIEVE SHE PICKED THE PHONE UP AND WE RAN IN THERE TO GET HER, YOU KNOW, TO REALLY SEE WHAT HAD HAPPENED. I'M TRYING TO REMEMBER. ME AND MONICA, THE OTHER GIRL, RAN BACK OUT. WE WERE SCARED, AND WE WERE GOING TO GO AND TRY TO GET HELP OR WHATEVER. WE WERE JUST IN TOTAL SHOCK.

Q. JENNIFER, DID YOU KNOW RAY?

A. YES, I DID.

* * *

[1436] **THE COURT:** GOOD AFTERNOON. YESTERDAY, AS YOU RECALL, THE 12 OF YOU SITTING AS A TRIAL JURY IN THE GUILT PHASE OF THE TRIAL FOUND WESLEY AARON SHAFER GUILTY OF

THREE CHARGES, ONE OF WHICH WAS MURDER. IT IS NECESSARY, AS WE TOLD YOU SEVERAL TIMES, THAT THIS ADDITIONAL PROCEEDING WILL TAKE PLACE TO DETERMINE THE PUNISHMENT THAT THE COURT IS TO IMPOSE UPON MR. SHAFER IN REGARD TO THE MURDER CHARGE.

THE PURPOSE IS FOR YOU TO DETERMINE, BASED ON THE EVIDENCE, WHETHER OR NOT HE SHOULD BE SENTENCED TO DEATH OR LIFE IMPRISONMENT.

[1437] AS TO YOUR ROLE IN THIS MATTER, YOU WILL BE ASKED TO RECOMMEND TO THE COURT THE SENTENCE FOR THE DEFENDANT, WESLEY AARON SHAFER. DURING THIS PROCEEDING THE STATE AND THE DEFENDANT WILL HAVE AN OPPORTUNITY TO INTRODUCE ADDITIONAL EVIDENCE IN EXTENUATION, MITIGATION OR AGGRAVATION. BOTH SIDES WILL HAVE AN OPPORTUNITY TO PRESENT ARGUMENTS FOR AND AGAINST THE DEATH PENALTY.

THE QUESTION HERE IS SHOULD YOU RECOMMEND A SENTENCE OF LIFE IMPRISONMENT OR SHOULD YOU RECOMMEND A SENTENCE FOR DEATH.

AFTER YOU HAVE HEARD – THE ATTORNEYS WILL MAKE OPENING STATEMENTS TO YOU. THE PATTERN WILL BE VERY MUCH THE SAME AS IT WAS IN THE INITIAL GUILT PHASE. THE ATTORNEYS WILL MAKE FOR YOU OPENING STATEMENTS. AGAIN, THEY ARE STATEMENTS; THEY ARE NOT ARGUMENTS, AND THEY ARE NOT EVIDENCE.

AFTER YOU HAVE HEARD THE EVIDENCE, AND THE CLOSING ARGUMENTS OF THE ATTORNEYS, THE LAST ARGUMENTS OF THE ATTORNEYS, OR BETTER STATED, THE LAST ARGUMENT OF THE STATE AND THE LAST ARGUMENT ON BEHALF OF THE DEFENDANT, YOU WILL RETIRE AND DETERMINE THE SENTENCE THAT SHOULD BE RECOMMENDED TO THE COURT.

I HAVE USED THE WORD RECOMMEND; I TELL YOU NOW AND I WILL TELL YOU LATER THAT UNDER THE LAW WHATEVER YOU AS TRIAL JURY RECOMMEND, THE COURT IS REQUIRED TO IMPOSE.

* * *

[1438] **OPENING STATEMENT TO THE JURY BY MR. BRACKETT:**

MAY IT PLEASE THE COURT. GOOD AFTERNOON MR. FOREMAN, LADIES AND GENTLEMEN OF THE JURY. WE HAVE NOW REACHED THAT SECOND STAGE OF THE TRIAL. AS WE ENTER THIS STAGE, WESLEY SHAFER STANDS CONVICTED OF MURDER, ATTEMPTED ARMED ROBBERY, AND CRIMINAL CONSPIRACY BY THE RETURNING OF YOUR VERDICTS YESTERDAY. WE ARE NOW TO THAT STAGE WHERE WE CONSIDER THE PUNISHMENT.

FOR EVERY ACTION THAT ANYBODY TAKES ANYWHERE, THERE ARE CONSEQUENCES. THAT'S WHERE WE'RE AT NOW. WHAT ARE THE CONSEQUENCES OF THIS ACTION.

THE STATE, AS IN THE PREVIOUS PHASE OF THE TRIAL, THE STATE BEARS THE BURDEN OF PROVING

TO YOU WHAT ARE CALLED STATUTORY AGGRAVATING CIRCUMSTANCES. IN THIS PHASE OF THE TRIAL, AS IN THE PREVIOUS PHASE, THE DEFENSE BEARS NO BURDEN WHATSOEVER. IF THEY CHOOSE TO PUT ANYTHING UP, THEY CAN. IF THEY DON'T, THEY DON'T HAVE TO. THAT'S THEIR OPTION. THE STATE BEARS THE BURDEN OF PROVING TO YOU THAT THERE EXISTED DURING THE COMMISSION OF THIS MURDER A STATUTORY AGGRAVATING CIRCUMSTANCE, AT LEAST ONE.

IF THE 12 OF YOU FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF AT LEAST ONE STATUTORY AGGRAVATING CIRCUMSTANCE, THAT AUTHORIZES YOU THEN TO PROCEED AND DELIBERATE ON WHETHER [1439] OR NOT THE SENTENCE FOR THIS CRIME SHOULD BE LIFE IMPRISONMENT OR DEATH.

THE STATE HAS ALLEGED TWO STATUTORY AGGRAVATING CIRCUMSTANCES. THAT THE MURDER WAS COMMITTED WHILE IN THE COMMISSION OF AN ARMED ROBBERY, AND THAT MEANS EXACTLY WHAT IT SAYS, THAT AN ARMED ROBBERY WAS IN PROGRESS, AND IT DOESN'T HAVE TO BE COMPLETED, BUT WHILE IT WAS IN PROGRESS, THIS DEFENDANT DID MURDER SOMEBODY. THAT'S THE FIRST STATUTORY AGGRAVATING CIRCUMSTANCE THAT WE HAVE ALLEGED.

THE SECOND IS, LARCENY WHILE IN THE POSSESSION OF A DEADLY WEAPON, WITH THE USE OF A DEADLY WEAPON.

LARCENY, THE JUDGE EXPLAINED TO YOU, IS THE TAKING OF SOMEBODY ELSE'S PROPERTY AND CARRYING IT AWAY WITH THE INTENT TO DEPRIVE THE OWNER PERMANENTLY OF THE USE THEREOF.

IN THIS PHASE WE ALSO WILL TELL YOU ABOUT OTHER POSSIBLE CONSEQUENCES. WE WILL TELL YOU ABOUT THE CONSEQUENCES, AND LADIES AND GENTLEMEN, THIS WILL BE ONE OF THE MOST PAINFUL TESTIMONY [sic] YOU WILL HAVE TO HEAR BECAUSE THE DEATH OF RAY BROOME IS LIKE AN EARTHQUAKE THAT SHATTERED HIS FAMILY OVER HERE, AND YOU WILL HEAR ABOUT WHAT HIS DEATH HAS DONE TO THEIR LIVES. AND THAT'S VERY, VERY DIFFICULT, AND WILL TEST EVERY EMOTIONAL RESOURCE THAT YOU HAVE.

FINALLY, WE WILL ALSO TELL YOU SOMETHING ABOUT THE DEFENDANT. WE WILL TELL YOU ABOUT HIS CHARACTER. WE WILL TELL YOU ABOUT HIM, HOW HE IS AND WHAT KIND OF PERSON HE IS.

[1440] THESE ARE ALL THINGS THAT YOU WILL HAVE TO CONSIDER WHEN YOU MAKE YOUR DECISION.

I SUBMIT TO YOU, LADIES AND GENTLEMEN, IF YOU LISTEN TO ALL OF THE EVIDENCE CAREFULLY, AT THE END OF THIS PHASE OF THE TRIAL, AND, OF COURSE, EVERYTHING THAT HAPPENED IN THE PREVIOUS PHASE, THAT'S NOT TO BE BLOTTED OUT, YOU CAN CONSIDER THAT AS WELL, ALL THE EVIDENCE THAT WE'VE ALREADY TALKED ABOUT, ALL THE EVIDENCE THAT'S ALREADY IN, YOU CAN

CONSIDER THAT IN MAKING YOUR DECISION, EXACTLY WHAT KIND OF CRIME THIS IS, AND AFTER CONSIDERING ALL OF THIS EVIDENCE, LADIES AND GENTLEMEN, I SUBMIT TO YOU YOUR VERDICT CAN ONLY BE ONE THING, THAT WESLEY SHAFER SHOULD BE SENTENCED TO DEATH FOR THIS TERRIBLE, TERRIBLE CRIME. THANK YOU VERY MUCH.

OPENING STATEMENT TO THE JURY BY MR. NETTLES:

WE OBVIOUSLY DIDN'T WANT TO BE HERE AT THIS PHASE OF THE CASE. I HOPE IT'S BEEN OBVIOUS TO YOU THAT WE HAVE TRIED VERY HARD TO BE GOOD LAWYERS AND PROVIDE WESLEY SHAFER WITH A VERY GOOD DEFENSE. WE DIDN'T WANT TO BE HERE. IT'S VERY SCARY, VERY SCARY BECAUSE AT THIS POINT WESLEY SHAFER'S LIFE, HE FACES JUST TWO ROADS, AND IT'S BECAUSE OF HIS OWN DOING. YOU HAVE FOUND HIM GUILTY OF MURDER; YOU HAVE FOUND HIM GUILTY OF CONSPIRACY; YOU HAVE FOUND HIM GUILTY OF ATTEMPTED ARMED ROBBERY. WE DON'T QUIBBLE WITH THAT. WE ACCEPT THAT; WE RESPECT YOUR VERDICT.

BUT AT THIS POINT IN WESLEY SHAFER'S LIFE, THERE [1441] ARE ONLY ONE OF TWO POSSIBLE VERDICTS, AND THAT IS LIFE IN PRISON, A 19 YEAR OLD CHILD OF GOD, OR DEATH.

* * *

AND YOU HAVE FOUND BY YOUR VERDICT THAT WESLEY SHAFER MADE THE DECISION TO KILL LUTHER RAY BROOME, AND HE MUST BE PUNISHED FOR THAT, AND HE WILL BE. BECAUSE IF IT ALL ENDED RIGHT NOW, WESLEY SHAFER WOULD SPEND THE REST OF HIS LIFE IN PRISON.

* * *

[1444] WE ASKED MOST OF YOU DURING VOIR DIRE WHEN WE WERE QUESTIONING YOU IF AT THE END OF THIS CASE IF WHEN THAT PEN COMES AROUND AND YOU ARE ASKED TO SIGN IT IF YOU WILL HAVE THE COURAGE TO SAY, NO, WE CAN PUNISH HIM, WE CAN PUNISH HIM HARD, WE CAN MAKE HIM SPEND THE REST OF HIS LIFE IN THE PRESENCE OF ONLY MEN, A 19 YEAR OLD, THAT BY THE END OF THIS CASE THERE WILL BE NO DOUBT IN YOUR MIND HE IS ONE OF THE LEAST OF GOD'S CHILDREN. THERE WILL BE NO DOUBT IN YOUR MIND THAT YOU CAN PUNISH HIM SEVERELY BY MAKING HIM SPEND THE REST OF HIS LIFE IN THE PRESENCE OF ONLY MEN, CONCRETE AND IRON, AND YOU WILL HAVE DONE YOUR JOB. AND YOU WILL BE PROUD THAT JUSTICE WOULD HAVE BEEN DONE.

AND THAT'S WHAT I'M GOING TO ASK YOU, TO PLEASE WAIT UNTIL YOU KNOW WESLEY SHAFER. AND WE'RE GOING TO GIVE YOU AN ABUNDANCE OF EVIDENCE TO ALLOW YOU TO KNOW WESLEY SHAFER. TO WAIT, AS WE ASK YOU, AND AS YOU

SWORE WHEN YOU TOOK YOUR VOIR DIRE, THAT YOU COULD WAIT UNTIL YOU'VE HEARD ALL OF THE EVIDENCE. THANK YOU.

THE COURT: CALL YOUR FIRST WITNESS.

MR. POPE: MAY IT PLEASE THE COURT, YOUR HONOR, FIRST OF ALL WE WOULD LIKE TO INCORPORATE BY REFERENCE ALL PREVIOUS EVIDENCE AND EXHIBITS THAT WERE TENDERED IN THE FIRST STAGE OF THE CASE SO THAT I CAN REFERENCE THEM IN THIS PHASE.

[1445] **THE COURT:** ANYTHING FROM THE DEFENSE ON THAT? THE MOTION IS TO INCORPORATE THE EVIDENCE FROM THE PENALTY PHASE TO THE GUILT PHASE.

MR. NETTLES: WITHOUT OBJECTION.

THE COURT: GRANTED.

MR. POPE: NEXT, I WOULD HAVE MARKED AS STATE'S EXHIBIT 37 A CERTIFIED TRUE COPY OF MR. SHAFER'S DRIVING RECORD.

MR. NETTLES: WITHOUT OBJECTION.

THE COURT: IT IS RECEIVED WITHOUT OBJECTION.

MR. POPE: THE STATE WOULD CALL OFFICER JERRY HOFFMAN TO THE STAND.

JERRY HOFFMAN, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY

MR. POPE:

Q. OFFICER HOFFMAN, I'M GOING TO ASK YOU IF YOU WOULD, STATE YOUR NAME AND OCCUPATION FOR THE JURY PLEASE.

A. MY NAME IS JERRY HOFFMAN, AND I WORK FOR THE YORK COUNTY SHERIFF'S DEPARTMENT; I'M EMPLOYED THERE AS A DETECTIVE.

Q. COULD YOU TELL THE JURY HOW LONG YOU'VE BEEN IN LAW ENFORCEMENT?

A. I'VE BEEN IN LAW ENFORCEMENT JUST A TAD OVER 10 YEARS.

Q. WOULD YOU TELL US HOW LONG YOU'VE BEEN WITH THE SHERIFF'S DEPARTMENT?

[1446] A. I'VE BEEN WITH THE SHERIFF'S DEPARTMENT EIGHT AND A HALF OF THOSE YEARS.

Q. I'LL CALL YOUR ATTENTION BACK TO OCTOBER 9TH, 1995; DID YOU HAVE AN OPPORTUNITY TO PERFORM AN INVESTIGATION CONCERNING THE DEFENDANT IN THIS CASE, WESLEY SHAFER?

A. YES, I DID.

Q. WOULD YOU RELATE TO THE JURY WHAT TRANSPIRED, AND WHERE THE CASE WAS LOCATED?

A. THE CASE WAS LOCATED IN ROCK HILL, IN THE COUNTY'S JURISDICTION, AND BASICALLY WE

RECEIVED A REPORT THAT THERE WERE TWO YOUNG LADIES UNDER 12 YEARS OF AGE WHO HAD HAD SOME SEX CRIMES COMMITTED AGAINST THEM.

Q. SPECIFICALLY, WOULD YOU RELATE TO THE JURY WHAT THE FACTS AND CIRCUMSTANCES INVOLVED IN THE CASE WERE?

A. THESE TWO GIRLS STATED THAT THEY WERE OVER AT VENDOR'S GALLERY WHICH WAS A GAME ROOM TYPE THING AT THE OLD ROCK HILL MALL, AND THAT THEY HAD LEFT FROM THERE AND WENT TO A HOUSE THAT WAS ACROSS CHERRY ROAD ON FARGO STREET WITH SOME GUYS. AND THEY WERE THERE, AND AT SOME POINT IN TIME WERE ENGAGED IN SEXUAL ACTIVITIES INSIDE THAT HOME.

Q. WHEN YOU SAY GUYS, DID YOU MAKE A DETERMINATION OF HOW MANY?

A. YES, I DID.

Q. WOULD YOU RELATE THAT?

A. SIX.

[1447] Q. AND TWO 12 YEAR OLD GIRLS; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. DID YOU DETERMINE FROM YOUR INVESTIGATION HOW THEY GOT INTO THE TRAILER, THE MOBILE HOME?

A. WE DETERMINED AT ONE POINT THAT THERE WAS A WINDOW THAT WAS GONE THROUGH, AND THEN THE DOORS WERE USED.

Q. DID YOU DETERMINE OR FIND OUT IN YOUR INVESTIGATION ANYTHING AS FAR AS THE RELATIONSHIP BETWEEN THE VARIOUS MALES; DID THEY KNOW EACH OTHER OR WERE THEY RELATED IN ANY MANNER?

A. YES, THEY WERE. THEY WERE SUPPOSED TO BE MEMBERS OF A GANG KNOWN AS THE –

MR. NETTLES: OBJECTION.

THE COURT: I SUSTAIN THAT OBJECTION. DISREGARD THAT.

MR. NETTLES: I MOVE THAT THAT BE STRICKEN. I WOULD ASK THAT IT BE STRICKEN, YOUR HONOR.

THE COURT: DISREGARD THE HEARSAY EVIDENCE ABOUT A GANG, REGARDLESS OF WHAT ITS NAME MAY BE. JUST DISREGARD THAT.

Q. OFFICER HOFFMAN, AGAIN, FROM YOUR INTERVIEWS AND YOUR INVESTIGATION, WAS IT CLEAR THAT THEY KNEW EACH OTHER?

A. YES, SIR.

Q. AND ULTIMATELY AS PART OF YOUR INVESTIGATION DID YOU IN FACT INTERVIEW THE TWO 12 YEAR OLD GIRLS?

[1448] A. YES, SIR, I DID.

Q. AND WHEN YOU TELL THE JURY SEX ACTS, WOULD YOU RELATE SPECIFICALLY WHAT YOU ARE TALKING ABOUT?

A. SEXUAL INTERCOURSE AND ORAL SEX BY BOTH MALE AND FEMALE.

Q. AND IN PARTICULAR, DID YOU ULTIMATELY GAIN SUFFICIENT EVIDENCE THAT CHARGES WERE BROUGHT AGAINST WESLEY SHAFER?

A. YES, I DID.

Q. PARTICULARLY, THE CHARGE OF CRIMINAL SEXUAL CONDUCT WITH A MINOR SECOND DEGREE, AND BURGLARY SECOND DEGREE NON-VIOLENT; IS THAT CORRECT?

A. THAT WOULD BE CORRECT.

Q. I'LL SHOW YOU WHAT'S BEEN MARKED AS STATE'S EXHIBITS 38 AND 39 FOR IDENTIFICATION, AND ASK IF YOU WOULD TAKE THE TIME TO LOOK AT THAT AND TELL ME IF YOU CAN IDENTIFY IT?

A. YES, THESE ARE THE INDICTMENTS THAT CAME ABOUT FROM THESE CHARGES.

Q. AND WHAT ARE THE ATTACHMENTS, CAN YOU IDENTIFY THAT ALSO?

A. SENTENCING FORM.

Q. AND ONE IS ATTACHED TO EACH INDICTMENT?

A. THAT IS CORRECT.

Q. YOUR HONOR, THESE ARE ALSO TRUE COPIES FROM YORK COUNTY, THEY WOULD BE

STATE'S EXHIBITS 38 AND 39 FOR IDENTIFICATION, AND WE WOULD MOVE THEM INTO EVIDENCE.

[1449] **MR. NETTLES:** WITHOUT OBJECTION, YOUR HONOR.

THE COURT: THEY WILL BE RECEIVED.

(THE INDICTMENT FOR CRIMINAL SEXUAL CONDUCT WITH THE SENTENCING FORM WAS MARKED STATE'S EXHIBIT 38, AND THE INDICTMENT FOR BURGLARY SECOND DEGREE WITH THE SENTENCING FORM WAS MARKED IN EVIDENCE AS STATE'S EXHIBIT 39 WITHOUT OBJECTION.)

Q. OFFICER IF YOU COULD, BASED ON YOUR INVESTIGATION, RELATE TO THE JURY EXACTLY WHAT HAPPENED AS FAR AS THE FEMALES, AS FAR AS WHAT OCCURRED WITH THE VARIOUS MALES IN GOING ACROSS THE STREET, HOW IT TOOK PLACE.

A. AGAIN, AS I SAID, THEY WERE AT THE VENDOR'S GALLERY, AND THEY WERE TALKING WITH THESE GUYS AND SOME OF THEM ASKED IF THEY COULD GO ACROSS TO THIS HOME THAT WASN'T OCCUPIED, IT WAS A RENTAL HOUSE. THEY WENT ACROSS THERE, MADE THEIR WAY INTO THE HOME WHERE AT SOME POINT IN TIME THEY WERE ASKED ABOUT HAVING SEX, AND THEY DECLINED BUT AFTER CONTINUALLY ASKING AT SOME POINT IN TIME THEY DID ENGAGE IN SEX ACTS WITH THESE GUYS.

Q. OKAY. IN PARTICULARLY IN YOUR INVESTIGATION DID YOU HAVE AN OPPORTUNITY TO INTERVIEW WESLEY SHAFER?

A. YES, I DID.

Q. DID YOU TAKE A STATEMENT FROM HIM?

A. YES, I DID.

Q. I'LL CALL YOUR ATTENTION TO THE STATEMENT THAT REFERS TO [1450] OCTOBER 9TH, 1995, THE INCIDENT OF OCTOBER 9TH, IS THAT CORRECT?

A. YES, THE STATEMENT WOULD HAVE CONCERNED THAT INCIDENT ON OCTOBER 9TH.

Q. WOULD YOU RELATE TO THE JURY WHAT WAS TOLD TO YOU BY MR. SHAFER DURING YOUR INVESTIGATION?

A. I WAS TOLD BY MR. SHAFER THAT HE WAS AT THE VENDOR'S GALLERY AND THAT HE ENDED UP OVER THERE WITH THESE GIRLS. THAT AT ONE POINT IN TIME HIM AND ONE OF THE GIRLS HAD GONE TO A BEDROOM, AND THAT HE ASKED HER IF SHE SUCKED DICK AND SHE SAID YES; AND THEN HE TOLD HER, "SUCK MY DICK", AND SHE DID.

Q. I BEG THE COURT'S INDULGENCE?

THE COURT: YES, SIR.

(AFTER A BRIEF PAUSE)

Q. OFFICER, ANSWER ANY QUESTIONS THE DEFENSE MAY HAVE.

CROSS EXAMINATION BY

MR. NETTLES:

Q. OFFICER HOFFMAN, YOU INVESTIGATED THIS CASE; ISN'T THAT CORRECT?

A. YES, SIR.

Q. AND YOU FOLLOWED THIS CASE TO TRIAL?

A. SOME PLEA ARRANGEMENTS WERE MADE.

Q. AND PURSUANT TO THE PLEA ARRANGEMENTS, WESLEY SHAFER PLED; ISN'T THAT RIGHT?

[1451] A. YES, SIR, THAT'S CORRECT.

Q. AND YOU WERE ONE OF TWO INVESTIGATORS ON THIS CASE. ONE OF THEM WAS MR. CHISOLM?

A. THAT'S CORRECT.

Q. AND YOU SPOKE TO THE GIRLS?

A. YES, SIR, THAT'S CORRECT.

Q. AND AS A GOOD INVESTIGATOR, YOU INVESTIGATED THIS CASE THOROUGHLY, DIDN'T YOU?

A. YES, SIR.

Q. AND YOU DID A REPORT, CORRECT?

A. IF YOU'LL REFER TO A SPECIFIC REPORT. THERE ARE SEVERAL REPORTS.

Q. I'M REFERRING TO YOUR GENERAL SESSIONS CASE FILE CASE SUMMARY.

A. YES, SIR.

Q. AND DURING THAT INVESTIGATION, YOU FOUND A COUPLE OF THINGS OUT; DIDN'T YOU?

A. I FOUND SEVERAL THINGS OUT; YES SIR.

Q. ONE OF THEM YOU FOUND WAS THERE WAS NO FORCE USED?

A. YES, SIR.

Q. AND YOU FOUND THAT THE GIRLS HAD TOLD WESLEY THAT THEY WERE 15?

A. I BELIEVE THE STATEMENTS BY THE GIRLS WAS THAT ONE SAID THEY WERE 15, AND THE OTHER ONE CLAIMED TO BE 14.

Q. OKAY. AND THESE GIRLS WERE AT THIS VIDEO PLACE, RIGHT; [1452] A POOL PLACE?

A. A TEENAGE GAME ROOM.

Q. A TEENAGE GAME ROOM. AND THEY HADN'T TOLD THE TRUTH ABOUT THEIR AGE?

A. I GUESS NOT.

Q. THERE WAS NO FORCE USED?

A. THAT WOULD BE CORRECT.

Q. AND AS A MATTER OF FACT, YOU TOOK A FAIRLY LENGTHY STATEMENT FROM MS. ALLISON KEELER, I BELIEVE, ISN'T THAT RIGHT?

A. YES, SIR.

Q. AND IN THAT RATHER LENGTHY STATEMENT MS. KEELER TOLD YOU IN RATHER GRAPHIC DETAIL ABOUT WHAT WENT ON, DIDN'T SHE?

A. YES, SIR. I ASKED HER TO BE AS DETAILED AS SHE COULD BE.

Q. AND SHE – THERE WAS NO EVIDENCE OF ANY FORCE FROM HER STATEMENT, WAS THERE?

A. NO, SIR.

Q. AS A MATTER OF FACT, SHE CAME TO THE PLEA, AND WANTED TO MAKE IT CLEAR TO THE JUDGE THAT THERE WASN'T ANY FORCE; ISN'T THAT RIGHT?

A. I CAN'T REMEMBER IF SHE WAS AT THE PLEA OR NOT.

Q. ALL RIGHT. THANK YOU, SIR. THAT'S ALL THE QUESTIONS I HAVE.

THE COURT: ANYTHING FURTHER, SOLICITOR?

[1453] **REDIRECT EXAMINATION BY**

MR. POPE:

Q. OFFICER, YOU SAID THERE WAS ANOTHER 12 YEAR OLD?

A. THAT'S CORRECT.

Q. AND THE INDICATION – I UNDERSTAND THERE WAS NO FORCE. YOU DID INDICATE THERE WERE HOW MANY MALES WITH THESE TWO 12 YEAR OLDS?

A. THERE WERE AT LEAST SIX MALES THAT ACTUALLY ENGAGED IN SEX WITH THE TWO FEMALES.

Q. AND YOU ULTIMATELY BROUGHT THE CRIMINAL CHARGES OF BURGLARY AND CSC, AND THIS DEFENDANT DID PLEAD GUILTY?

A. THAT'S CORRECT.

MR. NETTLES: MAY I HAVE A FEW BRIEF QUESTIONS, YOUR HONOR?

THE COURT: YES.

RECROSS EXAMINATION BY

MR. NETTLES:

Q. NOW, EVEN AFTER THESE QUESTIONS, LET'S BE CLEAR, OKAY? YOU KNOW, WHILE THEY ARE TRYING TO COUCH THIS AS SIX MALES, AND TWO GIRLS, THERE WAS NO INDICATION OF ANY FORCE FROM ANY MALE, WAS IT?

A. NOT PHYSICAL FORCE. THERE WERE TIMES WHEN –

Q. LET ME ASK YOU THIS. WAS THERE ANY PHYSICAL FORCE?

MR. POPE: OBJECTION, YOUR HONOR. HE DIDN'T ALLOW HIM TO FINISH HIS ANSWER. HE SAID NOT PHYSICAL FORCE, BUT, AND HE BEGAN TO EXPLAIN.

[1454] **THE COURT:** BUT THAT WASN'T THE QUESTION.

Q. YOU DID A REPORT WHERE YOU SAID THERE WAS NO FORCE USED, RIGHT?

A. PHYSICAL FORCE.

Q. GO AHEAD THEN.

A. THERE WAS A TIME WHERE ONE OF THE GIRLS TOLD US THAT SHE FELT PRESSURED BECAUSE SHE KEPT BEING ASKED, AND ASKED, AND ASKED.

Q. NOW, THERE IS NO EVIDENCE THAT – DO YOU HAVE A COPY OF YOUR CASE FILE THERE WITH YOU?

A. I HAVE A COPY OF WHAT I BELIEVE YOU ARE HOLDING THERE IN YOUR HAND.

Q. DO YOU HAVE A COPY OF THE GENERAL SESSIONS CASE FILE FROM THE YORK COUNTY SHERIFF'S DEPARTMENT?

A. YES, SIR.

Q. IS THAT YOUR NAME AT THE TOP THERE, CHISOLM AND HOFFMAN?

A. YES, SIR.

Q. IS THAT THE INCIDENT REPORT?

A. IT WOULD BE.

Q. IS THAT INCIDENT TYPED IN THE UPPER RIGHT-HAND CORNER?

A. YES, SIR.

Q. IS THAT A LIST OF THE VICTIMS' NAMES?

A. YES, SIR.

Q. DOES IT LIST THE SUSPECTS NAMES?

[1455] A. YES, SIR.

Q. AND THEN YOU'VE GOT A CASE SUMMARY AT THE BOTTOM?

A. YES, SIR.

Q. YOU SAY NO FORCE, DON'T YOU? THE LAST SENTENCE?

A. YES, SIR.

Q. I HAVE NO FURTHER QUESTIONS.

THE COURT: ALL RIGHT, YOU CAN STEP DOWN.

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MR. POPE: YOUR HONOR, MY DISCOVERY NOTEBOOK INDICATES THAT THEY HAVE RECEIVED A COPY OF THE INDICTMENT THAT INDICATED THAT IT WAS MARIJUANA. THEY RECEIVED A COPY OF THE WARRANT. THEY HAVE NOT RECEIVED A COPY OF THE ULTIMATE TEST.

THE COURT: WHAT DATE IS ON THE TEST?

MR. POPE: MAY 8TH OF 1997.

THE COURT: I SUSTAIN THE OBJECTION. BRING IN THE JURY.

MR. POPE: YOUR HONOR, IF IT PLEASE THE COURT, WE HAVE PREPARED A TRUE COPY OF THE INDICTMENT TO SHOW THAT THE CHARGE IS

PENDING. LIKE IN MAURICE HUGHES WHERE WE HAD COPIES CERTIFIED FROM CHARLOTTE BECAUSE AT THIS POINT THOSE DON'T HAVE TO BE PROVED BEYOND A REASONABLE DOUBT. IT'S JUST THAT THE INDICTMENT ALLEGES MARIJUANA.

[1459] **MR. BANKS:** I JUST WANT TO MAKE SURE THAT THE RECORD REFLECTS THAT I OBJECT, NOT TO THE PRESENCE OF THE DRUGS ON THE INDICTMENT, BUT THE TEST. WE CAN'T DEFEND WITHOUT THE TEST.

THE COURT: I SUSTAIN THE OBJECTION. YOU CAN ASK ABOUT A GREEN LEAFY SUBSTANCE BEING FOUND, AND THAT'S THE EXTENT OF IT. BRING IN THE JURY.

IN THE PRESENCE OF THE JURY:

THE COURT: THE JURY HAS RETURNED, YOU MAY PROCEED.

MICHAEL HAWKINS, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY

MS. MILLER:

Q. PLEASE STATE YOUR NAME FOR THE RECORD, AND SPELL YOUR LAST NAME.

A. MICHAEL HAWKINS, H-A-W-K-I-N-S.

Q. ON MAY 7TH, 1997, WHERE WERE YOU EMPLOYED?

A. I WAS EMPLOYED WITH THE UNION COUNTY SHERIFF'S OFFICE AS A JANITOR.

Q. AND ON THE MORNING OF MAY 7, 1997, CAN YOU TELL US WHAT, IF ANYTHING, UNUSUAL HAPPENED?

A. ACCORDING TO THE INCIDENT REPORT THAT I PREPARED THAT DAY, AT ABOUT 10:30 IN THE MORNING I WAS MAKING MY ROUNDS AT THE CITY JAIL WHICH IS WHERE WE WERE –

[1460] **THE COURT:** LET ME STOP YOU. I CAN'T HEAR YOU. COULD YOU JUST SPEAK A LITTLE LOUDER?

A. OKAY. ON THE MORNING OF THE 7TH AT ABOUT 10:30 I WAS MAKING MY ROUNDS WHICH WERE AT THE CITY JAIL, THE OLD JAIL, WHERE I NOTICED LIKE SMOKE AS WELL AS LIKE AN ODOR OF MARIJUANA THAT I THOUGHT –

MR. NETTLES: OBJECTION.

THE COURT: I SUSTAIN THE OBJECTION. LET THE JURY GO TO THE JURY ROOM.

IN CAMERA:

THE COURT: MR. HAWKINS, DID YOU NOT HEAR US DISCUSS AT LENGTH –

MR. POPE: COULD I BE HEARD ON THIS MATTER?

THE COURT: I KNOW HE JUST SAID HE SMELLED THE ODOR OF MARIJUANA.

MR. POPE: YES, SIR. AND IF IT PLEASE THE COURT, IF THIS IS BEING SUPPRESSED BECAUSE OF THE DISCOVERY ISSUE, I JUST WANT IT CLEAR ON THE RECORD, YOUR HONOR, THIS WITNESS CAN INDEPENDENTLY SMELL MARIJUANA WITHOUT AN EXPERT SAYING WHAT WAS ULTIMATELY RECOVERED WAS MARIJUANA. LIKEWISE, IF THE WHOLE ISSUE IS DISCOVERY, THE DEFENSE HAS CLEARLY BEEN ON NOTICE THAT THE DEFENDANT WAS CHARGED BECAUSE MR. ALL IS REPRESENTING HIM ON THESE CHARGES, THAT HE WAS CHARGED WITH HAVING MARIJUANA IN A JAIL CELL.

_I RESPECT THE COURT'S DECISION AS FAR AS BEING ABLE [1461] TO HAVE SOMEONE TO COME AND TESTIFY THAT THE MARIJUANA CIGARETTE THAT WAS RECOVERED WAS ULTIMATELY TESTED TO BE MARIJUANA, BUT NOTHING SHOULD PREVENT THIS OFFICER FROM TESTIFYING AS TO THAT, YOUR HONOR.

THE COURT: MR. BANKS?

MR. BANKS: YOUR HONOR, AT THE DISCOVERY CONFERENCE WE WERE TOLD BY A SOLICITOR THAT I KNOW YOU DON'T HAVE THE DRUG TEST, WE'LL GIVE IT TO YOU. THE REASON THAT WE ASKED THE QUESTION IS TO MAKE AN INDEPENDENT DETERMINATION OF WHETHER IT WAS MARIJUANA.

THIS IS A DEATH PENALTY CASE. WE HAVE GOT TO CHECK EVERY T AND EVERY I. AND THE COURT HAS RULED THAT WE DIDN'T GET THAT. SINCE WE

DIDN'T GET IT, ANY CONVERSATION OR ANY TESTIMONY OF THIS WITNESS AS TO IT BEING MARIJUANA IS IMPERMISSIBLE BECAUSE THE COURT'S ALREADY RULED IN THE ALTERNATIVE. THEY HAVEN'T LAID ANY FOUNDATION OR ANY KNOWLEDGE THAT THIS GUY KNOWS WHAT MARIJUANA SMOKE SMELLS LIKE.

THE COURT: I SUSTAIN THE OBJECTION. BRING IN THE JURY.

MR. BANKS: YOUR HONOR,WE WOULD MOVE FOR A MISTRIAL; IN THE ALTERNATIVE, WE WOULD MOVE FOR A DISMISSAL OF THE DEATH PENALTY NOTICE IN THE SENTENCING PHASE.

THE COURT: THOSE MOTIONS WILL BE DENIED. BRING IN THE JURY.

[1462] **MR. POPE:** JUST TO BE SURE I UNDERSTAND, IS SHE GOING TO BE ALLOWED TO LAY THAT FOUNDATION?

THE COURT: WE ARE NOT GOING TO GO INTO THAT IT WAS MARIJUANA. HE CAN TESTIFY THAT IT WAS A GREEN LEAFY SUBSTANCE.

IN THE PRESENCE OF THE JURY:

THE COURT: MEMBERS OF THE JURY, DISREGARD ANYTHING THAT WAS SAID ABOUT ANY TYPE OF ODOR THAT HE SMELLED AS FAR AS HIM DESIGNATING IT TO BE ASSOCIATED WITH ANY PARTICULAR DRUG. YOU MAY PROCEED.

CONTINUED DIRECT BY MS. MILLER:

Q. MR. HAWKINS, AT SOME POINT DID YOU APPROACH MR. SHAFER?

A. NOT AT THAT TIME I DIDN'T, NO.

Q. LATER DID YOU?

A. YES.

Q. PLEASE DESCRIBE THAT.

A. OKAY. AS I WAS SAYING, I SMELLED AN ODOR, AND I WENT BACK UP TO THE FRONT WHICH IS THE OFFICE AREA WHERE WE ANSWER THE PHONE, IT'S A LOBBY AREA. AND I CAN'T RECALL IF ANYONE - I MADE THE COMMENT TO SOMEBODY THAT I SMELLED SOMETHING, AND FOR THEM TO GO BACK AND SEE IF THEY COULD SMELL IT ALSO. I CAN'T REMEMBER IF ANYBODY WENT BACK THERE WITH ME, OR IF ANYBODY WENT BACK THERE. AT ANY RATE, I CONTACTED THE CITY -

Q. LET ME STOP YOU THERE. WE WILL MOVE FORWARD TO LATER IN [1463] THE DAY.

A. ALL RIGHT.

Q. AT APPROXIMATELY 5:30 -

THE COURT: LET ME JUST ASK YOU ONE THING. YOU SAID LATER IN THE DAY; WHEN DID THIS HAPPEN, I MISSED THE TIME.

Q. THIS WAS AT 10:30, YOUR HONOR.

THE COURT: HAS THAT BEEN TESTIFIED TO?

MS. MILLER: YES, YOUR HONOR.

THE COURT: ALL RIGHT, GO AHEAD.

Q. I'M SPEAKING ABOUT WHAT YOU DID, AND NOT WHAT ANYONE ELSE DID. IF YOU COULD STICK TO WHAT YOU DID.

A. ALL RIGHT.

Q. TELL US WHAT HAPPENED LATER IN THE DAY.

A. LATER IN THE DAY I CONTACTED CITY OFFICER ROBERT HINES WHO IS WITH THE CANINE UNIT.

Q. TELL US WHAT YOU DID WHEN YOU APPROACHED MR. SHAFER.

A. WELL -

Q. LATER THAT DAY AT 5:30 -

MR. BANKS: I OBJECT TO THE LEADING.

THE COURT: I SUSTAIN THE OBJECTION.

A. AT 5:30, LIKE I SAID, I HAD CALLED ROBERT HINES AND ASKED IF HE WOULD COME -

MR. BANKS: OBJECTION, NOT RESPONSIVE TO THE QUESTION.

[1464] **THE COURT:** I THINK HE HAS JUST SORT OF REFRESHED WHERE HE WAS IN HIS TESTIMONY. GO AHEAD.

Q. WHAT DID YOU DO AT 5:30?

A. OKAY. AT 5:30 I WENT TO THE CELL BLOCK FOR A CELL SEARCH OF MR. SHAFER'S CELL. FOR A CELL SEARCH YOU HAVE TO BRING THE SUBJECT OUT, SEARCH THE ENTIRE CELL, AND MAKE SURE THERE IS NO CONTRABAND OR WHAT-HAVE-YOU IN THERE. AT THAT TIME –

Q. DID YOU BRING HIM OUT OF HIS CELL?

A. YES, MA'AM.

Q. TELL US WHAT HAPPENED NEXT.

A. WE WERE IN THE HALL AREA WHICH WAS PROBABLY ABOUT THREE FOOT WIDE, AND I HAD HIM STAND AGAINST THE WALL, AND WHEN HE CAME OUT OF THE CELL HE HAD A DECK OF CARDS IN HIS HANDS. I ASKED MR. SHAFER IF I COULD SEE THE DECK OF CARDS, AND HE HANDED THEM TO ME. I OPENED THE DECK, PULLED OUT THE CARDS, AND A HOMEMADE CIGARETTE FELL ON THE FLOOR. AND AT THAT TIME I PROCEEDED WITH MY SEARCH OF THE CELL, AND FOUND A LIGHTER ALSO. AT THAT TIME I PROCEEDED TO GO UP FRONT AND PUT THE LIGHTER AND THE DECK OF CARDS, AND THE HOMEMADE CIGARETTES IN A BAG AND STAPLED THEM SHUT.

Q. OKAY, PLEASE ANSWER ANY QUESTIONS THEY MAY HAVE FOR YOU.

MR. BANKS: NO QUESTIONS, YOUR HONOR.

THE COURT: YOU MAY STEP DOWN, AND YOU CAN BE [1465] EXCUSED. THANK YOU.

MR. BANKS: WE HAVE A BRIEF MATTER TO TAKE UP OUTSIDE THE PRESENCE OF THE JURY, YOUR HONOR.

THE COURT: ALL RIGHT, I'LL LET YOU GO BACK OUT FOR JUST A MOMENT.

IN CAMERA:

THE COURT: YES, SIR?

MR. BANKS: YOUR HONOR, WE WOULD MOVE AT THIS TIME TO STRIKE THE ENTIRE TESTIMONY OF THIS WITNESS ON TWO GROUNDS. ONE, THERE HAS BEEN NO QUESTIONS AT ALL OF THIS WITNESS AS TO THE SUBSEQUENT CHARGES THAT WOULD BE RELEVANT TO PENDING CHARGES FOR AGGRAVATION.

AND PURSUANT TO YOUR PREVIOUS RULING ON THE MARIJUANA, THERE IS NOW NO FOUNDATION FROM THIS WITNESS AT ALL THAT THE PRESENCE OF SMOKE, A LIGHTER, OR A HANDMADE CIGARETTE IS AGAINST ANY RULE OF THE DETENTION CENTER SUCH AS WOULD GO TO ANY AGGRAVATION OR ANYTHING WRONG. IT'S NOT AGAINST THE LAW TO HAVE A LIGHTER OR A CIGARETTE AT THIS POINT IN THE TRIAL. THEREFORE, IT WOULD NOT BE RELEVANT AS AN AGGRAVATOR. WE MOVE TO STRIKE THE ENTIRE TESTIMONY.

MS. MILLER: THE NEXT WITNESS I WAS GOING TO CALL WAS GOING TO TELL US ABOUT THE RULES OF THE JAIL AT THAT TIME.

THE COURT: I'M GOING TO RESERVE MY RULING SUBJECT TO IT BEING CONNECTED UP. I

REMEMBER THE WITNESS USED THE [1466] WORD CONTRABAND, BUT I CAN'T REMEMBER THE CONTEXT IN WHICH HE USED IT EXCEPT HE SAID THEY WERE SEARCHING FOR CONTRABAND. I'M GOING TO RESERVE A RULING ON THAT, SUBJECT TO IT BEING CONNECTED UP. BRING IN THE JURY.

IN THE PRESENCE OF THE JURY:

THE COURT: CALL YOUR NEXT WITNESS.

MS. MILLER: THE STATE CALLS DeANNE McFALLS.

DeANNE McFALLS, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY

MS. MILLER:

Q. PLEASE STATE YOUR NAME FOR THE RECORD, AND SPELL YOUR LAST NAME.

A. APRIL DeANNE McFALLS.

Q. AND, MS. McFALLS, WHERE ARE YOU EMPLOYED?

A. UNION COUNTY JAIL.

Q. IN WHAT CAPACITY?

A. I'M A JAILER.

Q. AND HOW LONG HAVE YOU BEEN A JAILER FOR UNION COUNTY?

A. SINCE MAY OF 1997.

Q. IN MAY OF 1997, WHERE WAS THE JAIL LOCATED?

A. WE WERE AT THE CITY JAIL.

Q. AND WHERE IS IT NOW?

A. THE COUNTY JAIL IS NOW OUT NEXT TO THE CHAIN GANG.

Q. AND WHERE EXACTLY IS THE CITY LOCATED – YOU SAID THE [1467] CITY, WHAT DO YOU MEAN BY THAT?

A. THE CITY JAIL UP ON MAIN STREET.

Q. OKAY. YOU WERE WORKING AT THE CITY JAIL IN MAY?

A. YES, MA'AM. DO YOU RECALL – ARE YOU AWARE OF THE RULES CONCERNING CONTRABAND?

A. YES, MA'AM.

Q. COULD YOU TELL THE COURT WHAT THOSE RULES ARE?

THE COURT: ASK HER WHAT THE RULES WERE IN MAY OF 1997.

Q. IN MAY OF 1997, PLEASE TELL US WHAT THE RULES WERE.

MR. BANKS: OBJECTION, YOUR HONOR, AS TO RELEVANCE. THE ONLY ISSUE AT THIS POINT IS SMOKE, A CIGARETTE LIGHTER, AND A CIGARETTE.

THE COURT: I'LL ASK THAT HER ANSWER BE RESTRICTED TO THE POLICY IN REGARD TO THIS MATTER.

Q. DID YOU HAVE ANY RULES REGARDING LIGHTERS OR CIGARETTES?

A. YES, MA'AM.

Q. WHAT WERE THEY?

A. THEY WERE NOT TO BE ANY LIGHTERS OR CIGARETTES IN THE CELLBLOCK AREA.

Q. OKAY. WERE YOU WORKING WITH UNION COUNTY ON OCTOBER 28TH, 1997?

A. YES, MA'AM.

Q. AND WHERE WAS THE JAIL LOCATED IN THAT MONTH?

[1468] A. WE WERE UP AT THE CHAIN GANG.

Q. WHEN DID Y'ALL MOVE?

A. WE MOVED IN JULY.

Q. CAN YOU TELL US WHAT, IF ANYTHING, UNUSUAL HAPPENED ON OCTOBER 28TH?

A. YES, MA'AM. ON OCTOBER 28TH I HAD A GROUP OF INMATES OUT IN THE DAY ROOM AREA WHICH IS IN THE BACK OF THE JAIL WHERE THEY COULD CONVERSATE, USE THE PHONE, VISIT OTHER INMATES AND GET THEIR EXERCISE. THAT GROUP'S TIME WAS UP FOR THE DAY, AND I WAS GOING TO PUT THEM UP, AND LET THE OTHER INMATES OUT. AND I CALLED BACK TO THE DAY

ROOM AREA OVER THE INTERCOM. I WAS UP FRONT IN THE BOOKING AREA. SO, I CALLED BACK OVER THE LOUDSPEAKER AND I ASKED IF ANYONE WAS ON THE PHONE. NO ONE ANSWERED ME, SO I ASSUMED NO ONE WAS ON THE PHONE.

Q. HOW WOULD THEY BE ABLE TO ANSWER YOU?

A. THE INTERCOM SYSTEM. WHEN WE TURN THE SWITCH ON, IT'S TWO-WAY; WE CAN SPEAK TO THEM, AND THEY CAN SPEAK BACK.

Q. AND YOU SAID THEY WERE IN THE DAY ROOM?

A. YES, MA'AM.

Q. IS THAT WHAT YOU CALLED IT?

A. YES, MA'AM.

Q. AND YOU SAY THAT'S WHERE THEY VISIT WITH EACH OTHER?

A. THAT'S WHEN THEY HAVE THEIR EXERCISE TIME, USE THE PHONE, SHOWERS. THEY HAVE ANYWHERE FROM TWO TO THREE [1469] HOURS AT A TIME, DEPENDING ON HOW MANY INMATES WE HAVE IN THE JAIL.

Q. AND WHEN YOU SAY YOU PUT THEM UP, ARE THEY ALLOWED TO VISIT ONCE YOU PUT THEM UP?

A. LATER ON IN THE DAY THEY CAN VISIT. OR WHEN WE ARE PUTTING THEM UP, IF THEY DECIDE TO VISIT EACH OTHER OR PLAY GAMES, WE CAN

PUT THEM IN EACH OTHER'S CELL, LOCK THEM UP, AND THEN ALLOW ANOTHER GROUP TO COME OUT AND GET THEIR TIME.

Q. AND YOU SAID SOMETHING OVER THE INTERCOM?

A. I ASKED OVER THE LOUDSPEAKER IF ANYONE WAS ON THE TELEPHONE JUST TO LET THEM KNOW THAT I WAS FIXING TO CUT THE PHONES OFF AT THE JAIL, TO TELL WHOEVER WAS ON THE PHONE BY, I LOVE YOU, OR WHATEVER, GIVE THEM A CHANCE TO SAY GOODBY. NO ONE ANSWERED ME, SO I WALKED OVER TO THE PHONE SWITCHES THAT WE HAVE UP IN THE BOOKING AREA THAT TURNS THE TELEPHONE OFF, AND I TURNED THE SWITCHES OFF.

Q. WHY DO YOU DO THAT?

A. I HAVE HAD PROBLEMS IN THE PAST WHEN YOU TELL AN INMATE TO GET OFF THE PHONE, YOU CAN GIVE THEM FIVE MINUTES AND THEY STILL WON'T GET OFF THE PHONE, AND I HAVE HAD TO HANG UP THE PHONE PHYSICALLY ON AN INMATE, AND I'VE HAD A PHONE RECEIVER SLUNG AND HIT ME.

Q. SO, THIS IS THE WAY YOU HAVE TO DO IT NOW?

A. THIS WAY I HAVE NO PHYSICAL CONTACT WITH THEM.

[1470] Q. PLEASE GO AHEAD.

A. AFTER I TURNED THE PHONES OFF UP IN THE BOOKING AREA, I WENT THROUGH THE DAY ROOM DOOR, AND AS I GO THROUGH THE DOOR WESLEY SHAFER APPROACHES ME. HE WAS YELLING AND USING PROFANITY. DO I NEED TO TELL YOU EXACTLY WHAT HE SAID?

Q. PLEASE TELL US EXACTLY WHAT HE SAID.

A. WESLEY APPROACHES ME, HE COMES UP TO ME, AND HE WANTS TO KNOW "WHY THE FUCK DID YOU TURN OFF THE PHONE?" I SAID, EXCUSE ME? BECAUSE IT SHOCKED ME. HE SAID, "WHY THE FUCK DID YOU TURN OFF THE PHONE YOU FUCKING WHORE". AND AT THAT TIME I NOTICED HE WAS UPSET, AND TO KEEP FROM HAVING ANY PHYSICAL CONTACT, I START WALKING TOWARD THE CELL HOPING HE WOULD FOLLOW ME. HE KEPT ON YELLING AND SCREAMING. AND I TURNED AND I SAID, WESLEY, TIME IS UP, IT'S TIME FOR THE OTHER GROUP. HE CAME AND GOT UP IN MY FACE AND POINTED AT ME AND SAID, "YOU WANT ME TO GO OFF; YOU WANT ME TO GO OFF; YOU'RE GOING TO GET WHAT YOU'RE ASKING FOR." HE WAS SO CLOSE IN MY FACE THAT THE SPIT FROM HIS MOUTH LANDED ON MY FACE. I DIDN'T WANT TO MAKE ANY KIND OF PHYSICAL CONTACT WITH HIM. I THOUGHT THE BEST THING TO DO WAS TO GET HIM IN HIS CELL. WE WALKED TO HIS CELL; HE FOLLOWED ME; I OPENED THE DOOR, AND I TOLD HIM TO GO IN HIS CELL. HE WENT IN HIS CELL, AND I LOCKED THE DOOR. AFTER I LOCKED THE DOOR, I TOLD HIM HE [1471] WAS ON THREE DAY LOCK-DOWN FOR WHAT HAD HAPPENED. AND

AFTER I LOCKED THE DOORS AND STARTED TO WALK AWAY, HE TOLD ME, HE SAID "THAT'S WHY YOU LEFT THE PRISON, YOU'RE TOO SOFT, YOU'RE TOO SOFT, YOU'D NEVER MAKE IT".

Q. WHAT DID HE MEAN BY THAT'S WHY YOU LEFT THE –

MR. BANKS: OBJECTION.

THE COURT: I SUSTAIN THE OBJECTION. SHE CAN'T TESTIFY AS TO WHAT HE MEANS.

Q. WHERE DID YOU WORK BEFORE YOU STARTED WORKING FOR THE COUNTY?

A. I WAS A CORRECTIONAL OFFICER AT CROSS ANCHOR CORRECTIONAL INSTITUTION.

Q. WERE ANY CHARGES BROUGHT?

A. YES, MA'AM; I SIGNED A WARRANT ON HIM FOR WHAT HAD HAPPENED.

Q. WHAT WERE THE CHARGES?

A. THE CHARGES WERE SIMPLE ASSAULT.

MS. MILLER: THE COURT'S INDULGENCE, YOUR HONOR.

THE COURT: YES MA'AM.

(AFTER A BRIEF PAUSE)

MS. MILLER: PLEASE ANSWER ANY QUESTIONS THAT THE DEFENSE HAS FOR YOU.

A. YES, MA'AM.

THE COURT: CROSS?

MR. BANKS: YOUR HONOR, I WOULD ASK THAT THE JURY [1472] BE EXCUSED.

THE COURT: I'LL LET YOU GO TO THE JURY ROOM FOR JUST A MINUTE.

IN CAMERA:

THE COURT: YES, SIR?

MR. BANKS: THANK YOU, YOUR HONOR. YOUR HONOR, WE MOVE TO STRIKE UNDER RULE 16-320 BOTH IN THE UNDERLYING CODE AND IN THE SUPPLEMENT. UNDER 16-320(B) WHICH DEALS WITH IN A SENTENCING PROCEEDING THE JUDGE OR JURY SHOULD HEAR ADDITIONAL EVIDENCE IN EXTENUATION OR MITIGATION OR AGGRAVATION OF THE PUNISHMENT. ONLY SUCH EVIDENCE IN AGGRAVATION AS THE STATE HAS INFORMED THE DEFENDANT OF IN WRITING BEFORE THE TRIAL IS ADMISSIBLE.

16-320(C) IS THE ONE THAT DEALS WITH THE STATUTORY AGGRAVATORS. CONTRABAND IS NOT A STATUTORY AGGRAVATOR. SIMPLE ASSAULT IS NOT A STATUTORY AGGRAVATOR. THEREFORE, WE WOULD BE LIMITED TO 16-320(B) WHICH WOULD BE EVIDENCE IN AGGRAVATION IN ADDITION TO STATUTORY AGGRAVATORS THAT WE HAVE BEEN GIVEN NOTICE OF IN WRITING.

WE HAVEN'T BEEN GIVEN NOTICE OF EITHER THE VIOLATION OF CONTRABAND OR SIMPLE ASSAULT AS AN AGGRAVATOR.

THE COURT: MR. POPE? I'M SORRY, MR. BRACKET?

MR. BRACKETT: SOLICITOR POPE IS NOT IN HERE. I THINK THE NOTICE OF EVIDENCE IN AGGRAVATION SETS OUT WHAT STATUTORY AGGRAVATING FACTORS THE STATE SEEKS TO RELY ON, AND [1473] IN ADDITION WHAT OTHER, REFERENCING THE ONES MR. BANKS IS TALKING ABOUT, THE NON-STATUTORY AGGRAVATING CIRCUMSTANCES SUCH AS HIS CHARACTER AND SO FORTH.

THERE IS NO REQUIREMENT THAT WE SET OUT IN DETAIL WORD FOR WORD WHAT THE TESTIMONY OF EACH WITNESS IS. THAT IS AN OVERREADING OF –

THE COURT: YOUR POSITION IS THIS IS GOING TO CHARACTER?

MR. BRACKETT: YES, SIR, IT GOES TO CHARACTER, AND ALSO –

THE COURT: WAIT JUST A MINUTE. DID YOU NOTICE THAT CHARACTER WAS GOING TO BE ONE OF THE ISSUES IN AGGRAVATION?

MR. BRACKETT: IF THE COURT WILL INDULGE ME FOR JUST ONE MOMENT.

(AFTER A BRIEF PAUSE)

MR. BRACKETT: YES, SIR. SOLICITOR POPE PREPARED THAT NOTICE OF EVIDENCE IN AGGRAVATION. HE INFORMS ME THAT IT IS. I DON'T HAVE A COPY. HE'S GOING TO GET IT.

(AFTER A BRIEF PAUSE)

MR. BANKS: DO YOU WANT TO SEE IT?

THE COURT: YES, HAND ME A COPY UP.

(A COPY WAS GIVEN TO THE COURT)

MR. BRACKETT: THE LAST PARAGRAPH ON THE FIRST PAGE OF THE NOTICE OF EVIDENCE IN AGGRAVATION.

[1474] **MR. BANKS:** YOUR HONOR, WE WOULD NOTE THAT EVERY PARAGRAPH GOES TO PRIOR TO THIS INCIDENT EXCEPT FOR THE THIRD TO THE LAST ON THE SECOND PAGE, THE LAST SENTENCE WHICH REFERS TO CHARACTER AND PROPENSITY FOR VIOLENCE IN THE FUTURE. I THINK THERE IS ONE SENTENCE THAT GOES TO POST TO ARREST; THE REST OF THE ENTIRE BOILERPLATE LANGUAGE GOES TO PRIOR BAD ACTS.

MR. BRACKETT: NO, SIR. THE FIRST SENTENCE IN THE LAST PARAGRAPH. "THE STATE WILL PRESENT ANY AND ALL EVIDENCE RELATING TO PRIOR BAD ACTS, AND OTHER EVIDENCE RELATING TO THE DEFENDANT'S CHARACTER OCCURRING AT ANY TIME PRIOR TO THE CONCLUSION OF THE CASE". WHICH I BELIEVE WOULD BE NOW, OR HE COULD WALK OUT OF HERE AND DO SOMETHING, AND THAT COULD BE BROUGHT UP.

THE COURT: SHOW ME WHICH PARAGRAPH – Y'ALL HAVE POINTED ME TO THREE DIFFERENT PARAGRAPHS BEFORE I'VE HAD A CHANCE TO FINISH THE FIRST ONE.

MR. BRACKETT: FIRST PAGE THE LAST PARAGRAPH THAT BEGINS "THE STATE WILL PRESENT ANY AND ALL EVIDENCE".

THE COURT: ALL RIGHT.

MR. BRACKETT: AND IT GOES ON AND TALKS ABOUT LAWS, RULES, REGULATIONS. THROUGHOUT THAT PARAGRAPH IT DISCUSSES THAT.

THE COURT: I OVERRULE THE OBJECTION.

MR. BANKS: I'M SORRY, YOUR HONOR?

[1475] **THE COURT:** I OVERRULE THE OBJECTION. BRING IN THE JURY. IN THE PRESENCE OF THE JURY:

THE COURT: YOU MAY PROCEED.

CROSS EXAMINATION BY

MR. NETTLES:

Q. WHAT IS YOUR TITLE, CORRECTIONAL OFFICER?

A. JAILER.

Q. JAILER?

A. YES.

Q. MS. McFALLS, YOU FILLED OUT AN INCIDENT REPORT ON THIS; ISN'T THAT CORRECT?

A. YES, SIR.

Q. DO YOU HAVE A COPY OF THAT?

A. YES, SIR.

Q. AND IN THAT INCIDENT REPORT YOU PUT ALOT OF INFORMATION ON IT, DIDN'T YOU?

A. I WROTE IT DOWN.

THE COURT: I'M SORRY; I DIDN'T HEAR THE ANSWER.

A. I WROTE DOWN WHAT HAD HAPPENED.

Q. OKAY, YOU WROTE DOWN WHAT HAD HAPPENED. AND SOME OF THE THINGS YOU WROTE DOWN WAS THAT YOU TOOK THE TIME TO WRITE DOWN THE INCIDENT DATE. RIGHT?

A. RIGHT.

Q . AND THAT'S A DETAIL THAT YOU INCLUDED ON YOUR REPORT; [1476] ISN'T THAT RIGHT?

A. YES.

Q. AND YOU WROTE THE ADDRESSES OF THE DIFFERENT PEOPLE, YOU, WHERE THE INCIDENT TOOK PLACE?

A. YES.

Q. AND YOU WROTE DOWN THE TIME?

A. YES, SIR.

Q. AND THAT'S PRECISELY THE TIME IT TOOK PLACE, RIGHT?

A. APPROXIMATELY.

Q. APPROXIMATE TIME. AND THEN YOU WROTE DOWN THE STATE, AND YOU WROTE DOWN THE PHONE NUMBERS; YOU WROTE DOWN ALL THESE OTHER VARIOUS DETAILS; ISN'T THAT RIGHT?

A. YES, SIR.

Q. THIS IS AN ACCURATE, PRECISE AND DETAILED INCIDENT REPORT YOU'VE GOT HERE ISN'T IT?

A. YES, SIR.

Q. AND IN THIS ACCURATE, PRECISE AND DETAILED INCIDENT REPORT YOU HAVE, WHERE IS THERE ANY MENTION OF A STATEMENT "YOU'RE GOING TO MAKE ME GO OFF" IN YOUR ACCURATE, PRECISE AND DETAILED INCIDENT REPORT?

A. THERE ISN'T ONE.

Q. AND IN YOUR ACCURATE, PRECISE AND DETAILED INCIDENT REPORT THAT YOU FILLED OUT RIGHT AFTER IT HAPPENED, ISN'T THAT RIGHT?

A. YES, SIR.

[1477] Q. SO, IT'S FRESH IN YOUR MIND; RIGHT?

A. YES, SIR.

Q. YOU SAID I'M GOING TO WRITE DOWN EVERYTHING THAT HAPPENED SO THAT I CAN REMEMBER IT; ISN'T THAT RIGHT?

A. YES, SIR.

Q. WHERE IN YOUR ACCURATE, PRECISE AND DETAILED INCIDENT REPORT THAT WAS COMPLETED RIGHT AFTER IT TOOK PLACE IS THERE ANY MENTION OF "THAT IS WHY YOU ARE HERE BECAUSE YOU WERE TOO SOFT"; WHERE IS THERE ANY MENTION OF THAT?

A. IT'S NOT IN THIS REPORT.

Q. OKAY. NOW, LET'S TALK ABOUT THAT STATEMENT FOR A MOMENT. YOU'VE WORKED AT A PRISON?

A. YES, SIR.

Q. IT'S A TOUGH PLACE, ISN'T IT?

A. YES, SIR.

Q. AND IT'S NOT A VERY PRETTY PLACE TO BE, IS IT?

A. NO, SIR.

Q. IT WOULD BE A VERY DIFFICULT PLACE TO BE FOR THE REST OF YOUR LIFE, WOULDN'T IT?

A. YES, SIR.

Q. I HAVE NO FURTHER QUESTIONS.

THE COURT: ANY REDIRECT?

MS. MILLER: NO, SIR. WE WOULD ASK THAT SHE BE EXCUSED.

THE COURT: YOU MAY BE EXCUSED. THANK YOU. CALL [1478] YOUR NEXT WITNESS.

MS. MILLER: ELAINE PEAKE.

ELAINE PEAKE, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY

MS. MILLER:

Q. PLEASE STATE YOUR NAME FOR THE RECORD, AND SPELL YOUR LAST NAME.

A. ELAINE PEAKE, P-E-A-K-E.

Q. MS. PEAKE, WHERE ARE YOU EMPLOYED?

A. UNION COUNTY JAIL.

Q. AND IN WHAT CAPACITY?

A. JAILER.

Q. WERE YOU SO EMPLOYED ON SEPTEMBER 16TH, 1997?

A. YES.

Q. OKAY. TELL US WHAT, IF ANYTHING, UNUSUAL HAPPENED ON THAT AFTERNOON.

A. ON THAT AFTERNOON I WENT TO ESCORT AN INMATE BACK TO HIS CELL, AND I NOTICED B-1 WAS SMOKEY AS I WALKED PASSED. SO, I PUT THE INMATE UP, AND I CAME BACK.

Q. WHAT IS B-1?

A. IT'S A CELL.

Q. AND WHO WAS IN THAT CELL?

A. IT'S WESLEY SHAFER'S CELL. HE WAS IN THERE WITH TWO OTHER INMATES. TWO OTHER INMATES WERE VISITING.

[1479] Q. OKAY, TELL US WHAT HAPPENED THERE.

A. I OPENED THE DOOR AND I LOOKED IN, AND I SAID WHAT ARE YOU DOING, AND CLOSED THE DOOR BACK, AND WENT BACK TO THE FRONT.

Q. WHAT HAPPENED THEN?

A. I TOLD ROBIN PEAKE THAT I THOUGHT THEY WERE SMOKING IN THE CELL. WHEN I OPENED THE DOOR, THEY WERE SMOKING.

Q. WHAT HAPPENED NEXT?

A. WE TOLD JEFF LAWSON, AND HE TOLD US TO BRING WESLEY UP FRONT. WE BROUGHT HIM TO THE FRONT TO TALK TO JEFF, AND THEN ME AND ROBIN AND WESLEY WENT BACK AND WE SEARCHED HIS CELL.

Q. AND WHAT HAPPENED?

A. WE WERE SEARCHING THE CELL, FLIPPED THE MATTRESS UP AND FOUND A PACK OF CIGARETTES AND A LIGHTER.

Q. WERE YOU SO EMPLOYED WHEN THE JAIL MOVED FROM THE CITY TO THE COUNTY?

A. YES.

Q. CAN YOU TELL US, ARE THERE RULES CONCERNING CIGARETTES AND LIGHTERS AT THE COUNTY JAIL WHERE IT IS PRESENTLY LOCATED?

A. YES. AT THE COUNTY JAIL CIGARETTES OR ANYTHING LIKE THAT IS TAKEN AS CONTRABAND.

Q. DID YOU MAKE CHARGES CONCERNING THIS INCIDENT?

A. YES.

[1480] Q. WHAT CHARGES WERE THEY?

A. POSSESSION OF CONTRABAND.

Q. YOU SAY THERE ARE RULES?

A. UH HUH.

Q. IS MR. SHAFER AWARE OF THOSE RULES OR DO YOU KNOW?

MR. BANKS: OBJECTION.

THE COURT: I SUSTAIN THE OBJECTION.

MS. MILLER: COURT'S INDULGENCE.

(AFTER A BRIEF PAUSE)

Q. MS. PEAKE, HOW ARE INMATES APPRISED OF THE RULES IN THE COUNTY JAIL?

A. WHEN YOU BRING AN INMATE IN, WE HAVE TO READ THEM THE RULES AT THE JAIL.

Q. OKAY, AND DID YOU DO SO WITH MR. SHAFER?

A. YES.

Q. OKAY, THANK YOU. PLEASE ANSWER ANY QUESTIONS THE DEFENSE MAY HAVE.

CROSS EXAMINATION BY

MR. NETTLES:

Q. MA'AM, I'M SORRY, I DIDN'T GET YOUR NAME.

A. ELAINE PEAKE.

Q. IS THAT P-E-A-K?

A. P-E-A-K-E.

Q. JAILER PEAKE, YOU FOUND CIGARETTES IN WESLEY'S CELL?

A. YES.

[1481] Q. DO YOU REMEMBER WHAT BRAND OF CIGARETTES THEY WERE?

A. MARLBORO LIGHTS.

Q. SO, THEY WEREN'T HOMEMADE CIGARETTES, THEY WERE BRAND MANUFACTURED CIGARETTES?

(THE WITNESS SHOOK HER HEAD IN THE AFFIRMATIVE.)

Q. AND CIGARETTES ARE CONSIDERED CONTRABAND?

A. UH HUH.

Q. SO, WHEN YOU FOUND THE CIGARETTES, YOU MADE A CONTRABAND CHARGE?

A. YES.

Q. I HAVE NO FURTHER QUESTIONS OF THIS WITNESS.

MS. MILLER: NO FURTHER QUESTIONS. MAY THIS WITNESS BE EXCUSED?

THE COURT: YOU CAN STEP DOWN, AND BE EXCUSED.

MR. BRACKETT: THE STATE CALLS RICK WILLIAMS.

RICHARD M. WILLIAMS, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY

MR. BRACKETT:

Q. SIR, WOULD YOU PLEASE STATE YOUR FULL NAME, AND TELL US WHERE YOU ARE EMPLOYED?

A. MY FULL NAME IS RICHARD MELVIN WILLIAMS; I AM EMPLOYED WITH THE SOUTH CAROLINA DEPARTMENT OF PROBATION AND PAROLE SERVICES.

Q. HOW LONG HAVE YOU BEEN WITH PROBATION AND PAROLE?

[1482] A. I'VE BEEN WITH PROBATION AND PAROLE DEPARTMENT FOR AT LEAST SIX AND A HALF YEARS. IT WILL BE SEVEN IN JUNE.

Q. WHAT DO YOU DO FOR THEM?

A. I WAS AN INTENSIVE AGENT WHERE I HANDLED CLIENTS OF HIGH RISK.

Q. OKAY, SIR. AND WERE YOU DOING THAT BACK IN FEBRUARY OF 1996?

A. THAT IS CORRECT.

Q. DO YOU KNOW THE DEFENDANT IN THIS CASE, WESLEY AARON SHAFER?

A. YES, I DO.

Q. HOW DO YOU KNOW HIM?

A. WESLEY CAME TO MY OFFICE, HE HAD RECEIVED A CHARGE FROM YORK COUNTY FOR CRIMINAL SEXUAL CONDUCT.

Q. ANY OTHER CHARGES?

A. YES, HE HAD A BURGLARY SECOND DEGREE.

Q. AND WHAT WERE THE TERMS AND CONDITIONS OF HIS PROBATION?

A. THE TERMS AND CONDITIONS OF HIS PROBATION WAS HE WAS ON HOME DETENTION FOR AT LEAST SIX MONTHS. THAT IS SOMETHING LIKE HOUSE ARREST WHERE HE'S SUPPOSED TO BE AT HOME. HE WAS TO RECEIVE SEXUAL OFFENDER COUNSELING, AND SEVERAL OTHER THINGS SUCH AS REPORTING, FOLLOWING THE RULES OF PROBATION.

Q. AND WHO WAS RESPONSIBLE FOR INSURING THAT WESLEY AARON SHAFER COMPLIED WITH ALL OF THOSE TERMS AND CONDITIONS?

[1483] A. WESLEY HIMSELF.

Q. AND WHO WAS RESPONSIBLE FOR MAKING SURE HE DID?

A. I USUALLY ENFORCE THEM.

Q. WHEN DID HE BECOME A PROBATIONER UNDER YOUR CHARGE, WHAT DATE? DO YOU HAVE THAT INFORMATION?

A. IF I CAN RECALL, THAT DATE WAS FEBRUARY OF '96. I DON'T HAVE THE EXACT DATE.

Q. APPROXIMATELY HOW LONG DID YOU SUPERVISE HIM ON PROBATION?

A. I SUPERVISED HIM FOR APPROXIMATELY – I THINK IT WAS FEBRUARY TO DECEMBER OF '96 – FEBRUARY OF '96 TO DECEMBER OF '96.

Q. ALL RIGHT, SIR. AND COULD YOU TELL THE JURY GENERALLY HOW DID HE DO ON PROBATION?

MR. BANKS: OBJECTION.

THE COURT: I SUSTAIN THE OBJECTION.

Q. DID HE COMPLY WITH ALL OF THE TERMS AND CONDITIONS OF HIS PROBATION, AGENT WILLIAMS?

A. NO, HE DIDN'T.

Q. HOW DID HE VIOLATE THEM?

A. HE WAS ARRESTED FOR A DUS IN JULY OF '96, AND OPERATING AN UNINSURED VEHICLE. ALSO, THERE WAS A BURGLARY SECOND DEGREE

CHARGE. AND HE TESTED POSITIVE FOR MARIJUANA.

Q. WHEN DID HE TEST POSITIVE FOR MARIJUANA?

A. HE TESTED POSITIVE FOR MARIJUANA IN DECEMBER. I THINK IT [1484] WAS DECEMBER 3RD OF '96.

Q. OKAY. NOW, DID YOU EVER HAVE OCCASION TO GO TO HIS HOME?

A. YES, I DID.

Q. DID YOU EVER HAVE OCCASION TO MEET HIS PARENTS?

A. YES, I MET HIS MOTHER.

Q. AND DID YOU EVER NOTICE IN YOUR VISITS TO HIS HOUSE OR IN MEETINGS WITH HIS MOTHER, DID YOU EVER NOTICE ANYTHING UNUSUAL?

A. NO, I DIDN'T.

Q. WHEN DID YOU STOP SUPERVISING HIM ON PROBATION?

A. SOMETIME IN DECEMBER OF '96.

Q. WHO TOOK OVER AFTER YOU STOPPED?

A. DIANE JAMES.

Q. THANK YOU VERY MUCH, AGENT WILLIAMS. PLEASE ANSWER ANY QUESTIONS COUNSEL FOR THE DEFENSE HAS FOR YOU.

CROSS EXAMINATION BY

MR. NETTLES:

Q. OFFICER, I SENT AN INVESTIGATOR OUT TO TALK TO YOU, DIDN'T I?

A. THAT IS CORRECT.

Q. YOU TOLD HIM YOU DIDN'T WANT TO COME IN HERE AND TESTIFY, DIDN'T YOU?

A. I DON'T RECALL THAT, SIR.

Q. YOU DON'T RECALL THAT? YOU DON'T RECALL TELLING [1485] LAWRENCE MCKEELY THAT YOU DIDN'T WANT TO COME IN HERE AND TESTIFY AGAINST WESLEY SHAFER?

A. NO, SIR, I DON'T RECALL TELLING HIM THAT, SIR.

Q. YOU'RE NOT DENYING THAT YOU TALKED TO HIM?

A. I'M NOT DENYING THAT I DID TALK TO HIM.

Q. YOU WENT OUT TO WESLEY'S HOUSE ONE TIME?

A. THAT'S CORRECT.

Q. YOU DIDN'T WITNESS ANYBODY SETTING ANYBODY ON FIRE?

A. NO, SIR.

Q. YOU DIDN'T SEE HIS DADDY SET ANYBODY ON FIRE DID YOU?

A. NO, I DIDN'T, SIR.

Q. YOU DIDN'T SEE HIS DADDY KICKING WESLEY, DID YOU?

A. NO, I DIDN'T, SIR.

Q. YOU DIDN'T SEE HIS DADDY SLAPPING WESLEY, DID YOU?

A. NO, I DIDN'T, SIR.

Q. YOU DIDN'T SEE WESLEY LOCKED OUT IN THE COLD?

A. NO, I DIDN'T.

Q. YOU DIDN'T SEE WESLEY'S DAD THROWING HIS CHILDREN OUT IN THE FRONT YARD IN THEIR UNDERWEAR, DID YOU?

A. THAT IS CORRECT, SIR, I HAVEN'T.

Q. AS A MATTER OF FACT, HIS DADDY WASN'T EVEN THERE, WAS HE?

A. ACCORDING TO HIM, HIS DAD WAS THERE.

Q. WHAT ABOUT YOU, DID YOU SEE HIM?

A. NO, I DIDN'T.

[1486] Q. I HAVE NO FURTHER QUESTIONS.

MR.BRACKETT: JUST A COUPLE OF QUESTIONS ON REDIRECT, YOUR HONOR.

THE COURT: CERTAINLY.

REDIRECT EXAMINATION BY

MR. BRACKETT:

Q. AGENT WILLIAMS, MR. NETTLES ASKED YOU NUMEROUS QUESTIONS ABOUT BEATINGS, BURNINGS AND THAT SORT OF THING, DID YOU EVER IN THE ENTIRE NINE MONTHS THAT YOU SUPERVISED HIM NOTICE ANY SIGNS OF ABUSE ON MR. SHAFER?

A. NO, I DIDN'T.

Q. THANK YOU.

RECROSS EXAMINATION BY

MR. NETTLES:

Q. AGENT, YOU ARE AWARE, AREN'T YOU, THAT DRUG USE BY YOUNG PEOPLE IS OFTEN A SIGN OF AN ABUSE, ISN'T IT?

MR. BRACKETT: OBJECTION, YOUR HONOR.

THE COURT: WELL, HE CAN SAY HE'S NOT AWARE OF IT IF HE'S NOT.

Q. AND YOU'RE ALSO AWARE THAT SOMETIMES FAILURE TO COMPLY WITH PROBATION CAN BE A SIGN OF ABUSE, AREN'T YOU?

A. SIR, IF HE WASN'T COMPLYING, THERE WERE ACTIONS THAT I TOOK.

Q. I UNDERSTAND THAT, THAT'S NOT WHAT I'M ASKING YOU. I'M ASKING YOU, YOU ARE AWARE THAT FAILURE TO COMPLY - IN [1487] OTHER WORDS, MARIJUANA OR ACTING OUT AS A YOUNG CHILD, A CHILD OF WESLEY'S AGE CAN BE A SIGN OF ABUSE. YOU ARE AWARE OF THAT, AREN'T YOU?

MR. BRACKETT: OBJECTION, YOUR HONOR.

THE COURT: OVERRULED.

A. I GUESS YOU CAN SAY THAT, SIR.

Q. SO, THEN IN SOME RESPECTS PERHAPS, AND I UNDERSTAND YOU HAVE A LOT OF PROBATIONERS, THERE COULD HAVE BEEN SOME SIGNS OF ABUSE THAT MAYBE YOU JUST MISSED?

MR. BRACKETT: YOUR HONOR, THAT CALLS FOR SPECULATION.

THE COURT: I SUSTAIN THE OBJECTION.

Q. THANK YOU VERY MUCH.

THE COURT: YOU CAN STEP DOWN, AND BE EXCUSED.

MR. BRACKETT: THE STATE WILL CALL AGENT DIANE JAMES.

DIANE JAMES, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY

MR. BRACKETT:

Q. MA'AM, WOULD YOU PLEASE STATE YOUR FULL NAME, AND TELL THE JURY WHERE YOU ARE EMPLOYED?

A. MY NAME IS DIANE JAMES; I AM EMPLOYED WITH THE SOUTH CAROLINA DEPARTMENT OF PROBATION IN CHESTER COUNTY.

Q. YOU WORK WITH AGENT WILLIAMS?

[1488] A. YES, SIR.

Q. DO YOU KNOW THE DEFENDANT WESLEY AARON SHAFER?

A. YES, SIR.

Q. HOW DO YOU KNOW HIM?

A. I WAS HIS SUPERVISING AGENT FROM DECEMBER OF 1996 UNTIL APRIL OF 1997.

Q. ALL RIGHT, MA'AM. NOW, DURING THE TIME PERIOD THAT YOU SUPERVISED HIM, DID HE COMPLY WITH ALL OF THE CONDITIONS – DID HE VIOLATE ANY OF HIS CONDITIONS OF PROBATION?

A. YES, SIR.

Q. WHAT WERE THE CONDITIONS THAT HE VIOLATED?

A. IN MARCH OF '97 HE MISSED HIS REPORT; AND ALSO ON APRIL 10TH OF 1997 HE TESTED POSITIVE FOR MARIJUANA; AND HE ALSO MISSED A COUPLE OF REPORTS TO HIS SEX OFFENDER COUNSELING.

Q. WHAT KIND OF COUNSELING?

A. SEX OFFENDER COUNSELING.

Q. THANK YOU VERY MUCH, AGENT. ANSWER ANY QUESTIONS THAT THE DEFENSE MAY HAVE.

CROSS EXAMINATION BY

MR. NETTLES:

Q. AGENT JAMES, WESLEY SHAFER SHOWED UP A LOT OF TIMES, DIDN'T HE?

A. YES, SIR.

Q. YOU DIDN'T TELL THE JURY THAT, DID YOU?

[1489] A. I WASN'T ASKED THAT.

Q. ALL RIGHT, SO WE HAVE TO ASK YOU TO GET GOOD INFORMATION, DON'T WE?

MR. BRACKETT: OBJECTION.

THE COURT: I SUSTAIN THE OBJECTION. LET'S JUST STICK TO QUESTIONS AND ANSWERS.

Q. MR. SHAFER SHOWED UP A LOT OF TIMES, DIDN'T HE?

A. YES, SIR.

Q. HE GOT A JOB, DIDN'T HE?

A. YES, SIR.

Q. HE ACTUALLY GOT SEVERAL JOBS, DIDN'T HE?

A. YES, SIR.

Q. HE SHOWED UP FOR COUNSELING ON A NUMBER OF OCCASIONS, DIDN'T HE?

A. YES, SIR, HE DID.

Q. AS A MATTER OF FACT, HE REPORTED MORE TIMES THAN HE DIDN'T?

A. YES, SIR. I ONLY HAVE HIM MISSING ONE REPORT.

Q. THANK YOU VERY MUCH. I HAVE NO OTHER QUESTIONS.

MR. BRACKETT: NO FURTHER QUESTIONS. I ASK THAT THIS WITNESS BE EXCUSED.

THE COURT: YOU CAN STEP DOWN AND BE EXCUSED. THANK YOU.

MR. BRACKETT: THE STATE WOULD CALL ROBERT NEWTON TO THE STAND, YOUR HONOR.

[1490] **ROBERT NEWTON, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

DIRECT EXAMINATION BY

MR. BRACKETT:

Q. WOULD YOU STATE YOUR FULL NAME, AND SPELL YOUR LAST?

A. ROBERT ERVIN NEWTON, N-E-W-T-O-N.

Q. HOW OLD ARE YOU?

A. 19.

Q. WHERE DO YOU LIVE?

A. 401 WEST HIGH STREET.

Q. WHERE IS THAT?

A. RIGHT ACROSS THE STREET FROM THE HOSPITAL.

Q. SAY THAT AGAIN?

A. RIGHT ACROSS THE STREET FROM THE HOSPITAL.

Q. IN WHAT CITY?

A. UNION.

Q. DO YOU KNOW THIS INDIVIDUAL SEATED OVER HERE, WESLEY AARON SHAFER?

A. YES, SIR.

Q. HOW DO YOU KNOW HIM?

A. I WAS IN JAIL WITH HIM.

Q. WHEN WAS THAT?

A. BACK IN MAY.

Q. BACK IN MAY OF WHAT YEAR?

A. '97.

[1491] Q. WHAT WERE YOU DOING IN JAIL?

A. THIRD DUI.

Q. DUI THIRD OFFENSE?

A. YES, SIR.

Q. NOW, CAN YOU DESCRIBE WHERE THE JAIL WAS LOCATED WHEN YOU WERE IN JAIL WITH HIM?

A. IT WAS LOCATED AT THE CITY POLICE DEPARTMENT.

Q. HERE IN THE CITY OF UNION?

A. UH HUH.

Q. CAN YOU DESCRIBE BASICALLY WHAT THE LAYOUT OF THE JAIL IS?

A. THERE'S TWO DRUNK TANKS; THERE'S FIVE TWO MAN CELLS ON EACH SIDE, AND THERE'S A DAY ROOM.

Q. PEOPLE THAT WERE IN THE OLD JAIL ACROSS THE STREET, WERE THEY ABLE TO TALK TO ONE ANOTHER IN THE JAIL?

A. YES, SIR.

Q. AND WERE YOU ABLE TO TALK TO WESLEY SHAFER?

A. YES, SIR.

Q. HOW LONG WERE YOU IN JAIL WITH WESLEY SHAFER, ABOUT HOW LONG?

A. ABOUT TWO MONTHS.

Q. AT ANY POINT IN TIME DID YOU DISCUSS WITH HIM THE REASONS HE WAS IN JAIL?

A. YES, SIR.

Q. CAN YOU TELL US WHAT HE TOLD YOU?

[1492] A. HE TOLD ME ABOUT THE NIGHT THAT IT HAPPENED. HE TOLD ME THAT HE WENT TO THE STORE TWO OR THREE TIME PREVIOUSLY BEFORE THE ROBBERY AND MURDER HAPPENED. I TALKED TO BOTH OF THEM, SO IT WAS LIKE TWO DIFFERENT STORIES.

Q. TALKED TO BOTH WHO?

A. ADAM MULLINAX AND WESLEY. HE SAID THE NIGHT IT –

THE COURT: HE WHO?

A. WESLEY SHAFER. WESLEY SAID THAT THE NIGHT THE ROBBERY WAS COMMITTED OR WHATEVER HIM AND PORTER, JUSTIN PORTER I BELIEVE, WENT TWO OR THREE TIMES TO THE HOT SPOT AND THEN WENT BACK TO CHESTER AND PICKED UP ADAM MULLINAX.

Q. OKAY, GO AHEAD.

A. THEY WENT BACK TO THE STORE. WESLEY AND JUSTIN WENT IN. ADAM WENT IN TO USE THE BATHROOM, AND THEN COME BACK OUT AND SAT

IN THE TRUCK. I DON'T KNOW WHERE JUSTIN WENT, BUT WESLEY ASKED FOR A PACK OF MARLBORO LIGHTS, AND WHEN THE CLERK PUT THE PACK OF MARLBORO LIGHTS ON THE DESK, HE PULLED THE GUN OUT AND RAY BROOME WAS WRITING ON THE CLIP BOARD, SOMETHING ABOUT THE CLIP BOARD; HE LOOKED AT THE GUN, AND THEN HE LOOKED BACK DOWN AS IF HE DIDN'T EVEN SEE IT, YOU KNOW, JUST SAYING LIKE –

THE COURT: WHEN YOU SAY "HE", USE SOMEBODY'S NAME, EITHER SHAFER OR BROOME BECAUSE YOU KEEP GOING BACK AND FORTH AND IT'S HARD TO FOLLOW WHAT YOU'RE TELLING US. INSTEAD OF SAYING HE LOOKED UP, SAY BROOME LOOKED UP.

[1493] Q. HE SAW THE GUN, HE LOOKED UP, AND THEN BROOME LOOKED BACK DOWN. WESLEY TOOK IT – THIS IS WHAT HE TOLD ME, I WASN'T THERE – BUT HE TOOK IT LIKE A SMART COMMENT OR WHATNOT, AND THEN SHOT HIM.

Q. SO, HE WAS OFFENDED HE SAID BY SOME –

MR. NETTLES: OBJECTION.

THE COURT: I SUSTAIN THE OBJECTION. THERE WASN'T ANY TESTIMONY ABOUT THAT. REPHRASE YOUR QUESTION.

Q. WHAT WAS WESLEY SHAFER, WHEN HE WAS TALKING TO YOU AND RELATING THIS, WHAT WAS HIS DEMEANOR?

A. HIS DEMEANOR, WHAT DO YOU MEAN?

Q. I MEAN HOW DID HE ACT?

A. HE ACTED LIKE IT DIDN'T EVEN BOTHER HIM.

Q. AT ANY POINT IN TIME DID YOU DISCUSS OR DID WESLEY SHAFER DISCUSS THE DEATH PENALTY WITH YOU?

A. YES, HE DID.

Q. AND AT ANY POINT IN TIME DID HE HAVE OCCASION TO TELL YOU WHAT HE THOUGHT OF THE DEATH PENALTY?

MR. NETTLES: OBJECTION.

THE COURT: THIS IS MR. SHAFER?

MR. BRACKETT: YES, SIR.

THE COURT: WHAT'S THE GROUNDS OF YOUR OBJECTION?

MR. NETTLES: WELL, IT MAY BE PROPER REPLY FIRST OFF. SECONDLY, IT'S HEARSAY; IT'S AN UNSWORN OUT OF COURT STATEMENT.

[1494] **THE COURT:** BY WHO?

MR. NETTLES: BY WESLEY SHAFER, BUT IT'S NOT A STATEMENT AGAINST INTEREST.

MR. BRACKETT: MAYBE WE SHOULD TAKE IT UP OUT OF THE PRESENCE OF THE JURY, YOUR HONOR.

THE COURT: YES. LET ME LET YOU GO TO THE JURY ROOM FOR A FEW MINUTES.

* * *

[1498] **THE COURT:** BRING IN THE JURY.

IN THE PRESENCE OF THE JURY:

THE COURT: YOU MAY CONTINUE.

MR. BRACKETT: YOUR HONOR, I WILL WITHDRAW MY LAST QUESTION. I HAVE NO FURTHER QUESTIONS OF THIS WITNESS. PLEASE ANSWER ANY QUESTIONS THAT COUNSEL FOR THE DEFENSE MAY HAVE.

CROSS EXAMINATION BY

MR. ALL:

Q. ROBERT, LET ME ASK YOU A FEW MORE QUESTIONS. YOU TALKED ABOUT WHAT YOU AND WESLEY TALKED ABOUT WHEN YOU WERE IN JAIL FOR WHAT, I THINK DUI THIRD, HABITUAL OFFENDER, DUI THIRD?

A. DUI THIRD.

Q. DID WESLEY SEND YOU A LETTER AFTER YOU GOT OUT OF JAIL?

A. YES, HE DID.

Q. WHAT DID THAT LETTER SAY?

A. HE JUST PRETTY MUCH SAID "STAY OUT OF TROUBLE; DON'T DRINK AND DRIVE." I REMEMBER ONE SENTENCE IN THERE, HE SAID "DON'T DRINK AND DRIVE; DON'T DRINK BECAUSE LOOK WHAT HAPPENED TO ME".

Q. DID HE APOLOGIZE ABOUT ANYTHING?

[1499] A. HE APOLOGIZED ABOUT –

MR. BRACKETT: YOUR HONOR, I OBJECT; THIS IS SELF-SERVING HEARSAY, AND IT'S NOT ANYTHING THAT'S UNDER THE EXCEPTION TO THE HEARSAY RULE.

THE COURT: I OVERRULE THE OBJECTION. GO AHEAD AND ASK THE QUESTION.

Q. DID WESLEY APOLOGIZE FOR ANYTHING?

A. YES, SIR, HE DID.

Q. WHAT DID HE APOLOGIZE FOR?

A. HE APOLOGIZED TO MY GIRLFRIEND BECAUSE SHE WAS A FRIEND OF RAY BROOME'S. HE APOLOGIZED ABOUT THAT.

Q. FOR SHOOTING HIM?

A. UH HUH.

Q. THANK YOU, ROBERT.

MR. BRACKETT: NO FURTHER QUESTIONS, YOUR HONOR.

THE COURT: YOU CAN STEP DOWN, AND BE EXCUSED. THOSE OF YOU ON THE JURY PANEL HAVE BEEN IN AND OUT, WE HAVE NOT. SO, WE ARE GOING TO TAKE ABOUT A 10 MINUTE BREAK.

AFTER THE BREAK:

THE COURT: IS THE STATE READY?

MR. POPE: THE STATE IS READY, YOUR HONOR.

THE COURT: THE DEFENSE?

MR. BANKS: THE DEFENSE IS READY, YOUR HONOR.

THE COURT: BRING THE JURY BACK IN.

IN THE PRESENCE OF THE JURY:

[1500] **THE COURT:** CALL YOUR NEXT WITNESS.

MR. POPE: MAY IT PLEASE THE COURT, YOUR HONOR, THE STATE WOULD CALL JOHN BAILEY TO THE STAND.

JOHN M. BAILEY, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY

MR. POPE:

Q. OFFICER BAILEY, IF YOU WOULD, STATE YOUR NAME AND OCCUPATION FOR THE JURY PLEASE.

A. JOHN MARTIN BAILEY, JAILER AT THE UNION COUNTY JAIL, SHERIFF'S OFFICE.

Q. CAN YOU TELL THE JURY HOW LONG YOU HAVE BEEN EMPLOYED WITH THE UNION COUNTY JAIL?

A. ABOUT A YEAR AND A HALF.

Q. AND COULD YOU TELL THE JURY WHERE THE JAIL IS CURRENTLY LOCATED?

A. ON JONESVILLE HIGHWAY RIGHT NEXT TO THE CHAIN GANG.

Q. PRIOR TO OPENING THAT NEW JAIL, WHERE WAS IT PREVIOUSLY LOCATED?

A. AT THE CITY POLICE DEPARTMENT.

Q. BEHIND THE COURTHOUSE?

A. YES, SIR.

Q. I'LL CALL YOUR ATTENTION BACK TO THE EVENING OF APRIL 13TH, 1997. WERE YOU WORKING THAT EVENING?

A. YES, SIR, I WAS.

[1501] Q. DID THERE COME AN OPPORTUNITY AFTER OFFICER CUDD HAD TRANSPORTED THE DEFENDANT THAT YOU WERE IN THE DEFENDANT'S PRESENCE IN THE JAIL OVER THERE?

A. YES, I WAS.

Q. WOULD YOU RELATE TO THE JURY HOW THAT TOOK PLACE?

A. THEY BROUGHT MR. SHAFER IN, THEY DRESSED HIM OUT, PUT HIM IN A CONFERENCE ROOM, AND THEY TOLD ME TO HAVE A SEAT IN THERE WITH HIM UNTIL THEY GOT BACK, TO WATCH HIM FOR A WHILE. WHILE I WAS SITTING IN THERE WITH HIM, HE JUST COME UP AND ASKED ME, ASKED ME A STATEMENT WAS HIS FATHER

GOING TO GET HIS PISTOL BACK. AND THAT'S ABOUT IT.

Q. DID YOU THREATEN HIM IN ANY WAY OR PROMISE HIM ANYTHING?

A. NO, SIR, I DIDN'T.

Q. DID YOU QUESTION HIM ANY PRIOR TO THAT OR AFTER THAT?

A. NO, SIR.

Q. WHAT WAS HIS DEMEANOR; HOW DID YOU OBSERVE HIM WHEN HE ASKED YOU THAT QUESTION?

A. HE WAS JUST SITTING THERE CALM; JUST SITTING AROUND, NOTHING ELSE.

Q. THANK YOU. ANSWER ANY QUESTIONS THE DEFENSE HAS.

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[1615] **DR. J. PATRICK GOLDSMITH, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

DIRECT EXAMINATION BY

MR. NETTLES:

Q. DR. GOLDSMITH, DID YOU HAVE AN OPPORTUNITY TO MEET WITH MR. WESLEY SHAFER?

A. I DID.

Q. AND WHEN WOULD HAVE BEEN THE FIRST TIME YOU HAD AN OPPORTUNITY TO MEET WITH HIM?

A. HE WAS REFERRED TO ME IN AUGUST OF '96 BY THE HAZEL PITTMAN CENTER. HE WAS INVOLVED WITH A STATE AGENCY BECAUSE OF A CRIMINAL CHARGE OF SEXUAL MISCONDUCT.

[1616] Q. AND WHY WAS HE SENT TO YOU?

A. I DO A LOT OF WORK IN THAT AREA, AND HAVE HAD TRAINING IN THAT AREA.

Q. I MEAN WHAT WERE YOU INITIALLY LOOKING FOR WHEN HE WAS SENT TO YOU?

A. WHAT THEY WERE TRYING TO FIND OUT, THEY DID NOT DO WORK IN THAT AREA. AFTER INITIAL ASSESSMENT, THEY HAD SENT HIM THERE TO DETERMINE –

Q. SENT HIM FROM WHERE?

A. PROBATION SENT HIM TO HAZEL PITTMAN.

Q. WHAT IS HAZEL PITTMAN?

A. HAZEL PITTMAN IS A LOCAL ALCOHOL AND DRUG ABUSE COMMISSION, BUT THEY ALSO DO A LOT OF CORPORATE REFERRALS; THEY DO ASAP, ALCOHOL AND DRUG SAFETY PROGRAM WHICH IS FOR DUI'S, SO THEY REFERRED HIM OUT BECAUSE THEY FELT LIKE THAT PARTICULAR CENTER WAS NOT WHAT HE NEEDED FOR THAT OFFENSE; THAT HE NEEDED A SPECIALIST.

Q. WHAT WAS THAT OFFENSE?

A. SEXUAL MISCONDUCT.

Q. WAS IT CSC WITH A MINOR?

A. YES.

Q. NOW, TELL THE JURY A LITTLE BIT ABOUT YOUR TRAINING?

A. MY UNDERGRADUATE DEGREE IS IN PSYCHOLOGY AT PRESBYTERIAN COLLEGE; MY MASTERS IN COUNSELING PSYCHOLOGY WAS FROM THE UNIVERSITY OF GEORGIA. I HAVE BEEN LICENSED TO [1617] PRACTICE FOR 20 YEARS.

Q. LICENSED IN WHAT?

A. COUNSELING PSYCHOLOGY.

Q. HAVE YOU JUST RECENTLY RECEIVED A –

MR. POPE: MAY IT PLEASE THE COURT, THE STATE WOULD STIPULATE THAT HE IS AN EXPERT IN COUNSELING PSYCHOLOGY.

THE COURT: I FIND HE IS SO QUALIFIED. THIS WILL BE ANOTHER EXPERT LIKE I TALKED TO YOU ABOUT BEFORE.

Q. THANK YOU. NOW, WHEN YOU FIRST MET WITH WESLEY YOU SAY IT WAS FOR A SEXUAL MISCONDUCT CHARGE?

A. THAT IS CORRECT.

Q. AND WHAT WERE YOU ASKED TO DETERMINE AT THAT TIME?

A. ONE THING THEY WANTED TO KNOW IS WHETHER OR NOT THERE WAS A PROBLEM THAT COULD BE – IF THERE WAS GOING TO BE REPEATED

PROBLEMS IN REGARD TO THE SEXUAL MISCONDUCT, IF THERE WAS A DIAGNOSIS OF LIKE A PEDOPHILE OR SOMETHING LIKE THAT.

Q. IS THAT SOMETHING THAT YOU ARE QUALIFIED TO DETERMINE?

A. I WORK A LOT WITH THAT, YES.

Q. WHAT WAS YOUR DIAGNOSIS OF THAT PARTICULAR PROBLEM?

A. THAT WAS NOT THE PARTICULAR PROBLEM. WHAT HAPPENED –

Q. I'M SORRY, WHAT WAS NOT THE PARTICULAR PROBLEM?

A. THE SEXUAL MISCONDUCT. THAT WAS A SITUATION IN WHICH IT WAS CONSENSUAL. THERE WERE OTHER PROBLEMS THAT WERE FOUND THOUGH INITIALLY.

[1618] Q. WHAT DID YOU FIND OUT?

A. HE ACKNOWLEDGED INITIALLY THAT THERE WERE PROBLEMS. THE CLOSEST THAT HE WOULD COME IS THAT IT WAS AN AUTHORITY TYPE, HE DID ACKNOWLEDGE THAT, BUT HE WAS UNABLE TO DEAL WITH THAT IN ANY DEPTH.

Q. IS THAT UNUSUAL?

A. NOT AT ALL. HE WAS ALSO NON-COMPLIANCE IN COMING IN FOR TREATMENT.

Q. WHAT DOES THAT MEAN?

A. HE DID NOT SHOW UP FOR APPOINTMENTS; HE DID NOT CALL; ALL OF THAT.

Q. IS THAT UNUSUAL?

A. NOT IN THE COURTS – NOT AFTER REFERRAL FROM PROBATION AND PAROLE. THE FIRST THING YOU LOOK FOR IS WHETHER THERE IS AN UNDERLYING PROBLEM OF ALCOHOL OR DRUG ABUSE. AND I TALKED TO HIM ABOUT THAT; HE DENIED THAT. OF COURSE, HE WAS COMING FROM HAZEL PITTMAN, BUT HE DENIED THAT THERE AND SUBSEQUENTLY LATER WHEN I SAW HIM IN THE JAIL, HE ADMITTED TO DRUG ABUSE TO AN ADDICTIVE LEVEL.

Q. AT WHAT?

A. AT AN ADDICTIVE LEVEL.

Q. WHAT CAN THAT BE A SIGNAL FOR YOU?

A. AT AN ADDICTIVE LEVEL THERE IS GOING TO–BE PROBLEMS IN REGARD TO IMPULSE CONTROL. WHAT HAPPENED IS THAT OVER PROGRESSION THERAPY IT CAME EVIDENT THAT THERE WERE [1619] ALSO UNDERLYING PROBLEMS THAT HE WAS ATTEMPTING TO MASK.

Q. WHAT DO YOU MEAN BY "MASK"?

A. THAT HE WOULD TALK ABOUT THE ABUSE THAT HAS BEEN COVERED HERE.

Q. WHAT ABUSE?

A. BY HIS FATHER. BUT WHEN HE TALKED ABOUT IT, IT WAS WHAT I CALL WORDS WITHOUT AFFECT.

Q. WHAT DOES THAT MEAN?

A. THE EMOTIONAL COMPONENT WAS NOT THERE.

Q. WHAT DO YOU MEAN BY THE EMOTIONAL COMPONENT WAS NOT THERE?

A. THAT MEANS THAT WHEN HE TALKS ABOUT IT, HE TALKS ABOUT THE ABUSE AS IF HE WERE READING IT IN A NEWSPAPER OR SOMETHING. WHAT HAPPENS IS THAT'S GENERALLY A SITUATION THAT'S OVER A LONG PERIOD OF TIME THAT SOMEONE HAS LEARNED TO PUSH THOSE EMOTIONS BACK. AND, OF COURSE, THE ALCOHOL AND DRUGS GIVE HIM THE ABILITY TO THAT EVEN MORE.

Q. GIVE HIM THE ABILITY TO DO WHAT?

A. PUSH THE EMOTIONS DOWN. IF THE ADDICTION IS A DISEASE, IT WILL BE MORE DIFFICULT TO GET THEIR FEELINGS OUT. THE PROBLEM IS THAT HE KEEPS IT DOWN.

Q. KEEPS WHAT DOWN?

A. THE EMOTIONS, SO THAT WHAT HAPPENS IS THAT THEIR IMPULSE CONTROL PROBLEMS BECOME EVEN MORE SEVERE.

[1620] Q. WHAT CAUSES IMPULSE CONTROL PROBLEMS?

A. THE EMOTIONS THAT ARE NOT DEALT WITH. BASICALLY IT BECAME EVIDENT THAT THERE WERE TWO PROBLEMS THAT WERE GOING ON. THIS WAS NOT IN THERAPY, THIS WAS ONLY AFTER HE WAS SEEN AT THE JAIL.

Q. LET'S TALK ABOUT THAT FOR JUST A SECOND IF YOU DON'T MIND. WHEN IS THE FIRST TIME THAT YOU WERE ABLE TO DETERMINE THAT THERE MAY BE SOME PROBLEMS ARISING FROM ABUSE AS IT RELATED TO WESLEY?

A. THAT WAS AROUND – I SAW HIM FOR A TOTAL OF SEVEN TIMES AND ABOUT THE THIRD OR FOURTH TIME IT WAS EVIDENT THAT THAT WAS GOING ON BECAUSE OF WHAT I DESCRIBED. IN OTHER WORDS, THE WAY THAT HE DEALT WITH IT. AND WHAT HAPPENED IS THAT FROM THAT POINT ON, THAT'S WHEN HE BECAME MORE NON-COMPLIANT WITH TREATMENT WHICH IS NOT UNUSUAL.

Q. BEFORE OR AFTER YOU STARTED TO TALK ABOUT THAT?

A. AFTER WE STARTED TO TALK ABOUT THAT.

Q. IS THAT UNUSUAL FOR SOMEONE, ONCE YOU START TO TOUCH ON THIS ABUSE, TO BECOME NON-COMPLIANT?

A. NOT AT ALL.

Q. DOES THAT HOLD TRUE WITH JUST REGULAR PEOPLE COMING IN TO SEE YOU?

A. IT HOLDS TRUE WITH PEOPLE WHO HAVE JUST ABUSE AND NOT ADDICTION. WHEN THEY HAVE BOTH, IT IS A DUAL DISORDER. AND BY THAT WHAT HAPPENS IS IT MEANS THEY HAVE A GREATER [1621] CHANCE OF RELAPSE AS FAR AS ADDICTION, AND THEY ALSO WILL COMPLICATE THE TREATMENT BECAUSE THE ADDICTION KEEPS THAT DOWN, ALL OF THE EMOTIONS. AND YOU

CANNOT TREAT PHYSICAL ABUSE WITHOUT ACCESSING THEIR EMOTIONS. THAT IS ONE OF THE COMPONENTS THAT YOU HAVE TO GET TO. SO, THEY HAVE TO BE CLEAR OF ALCOHOL AND DRUGS TO BE TREATED.

Q. SO, LET ME ASK YOU THIS THEN. WHEN YOU FIRST REALIZED THAT THERE WAS SOME EVIDENCE OF ABUSE, WAS THAT BEFORE OR AFTER THE CHARGES FOR WHICH WESLEY IS ON TRIAL NOW?

A. IT WAS BEFORE THE CHARGES.

Q. AND WHEN IS THE FIRST TIME THAT HE TOLD YOU ABOUT ANY ABUSE AT THE HANDS OF HIS FATHER?

A. THE FIRST TIME – I'LL HAVE TO LOOK BACK AT MY NOTES, BUT I WANT TO SAY THAT IT WAS PROBABLY IN SEPTEMBER OF '96 OR RIGHT ABOUT IN THERE.

Q. AND WAS THAT BEFORE OR AFTER THIS CHARGE?

A. THAT WAS BEFORE THIS CHARGE.

Q. SO, WHAT WAS ONE OF THE FIRST THINGS HE TOLD YOU ABOUT THE ABUSE FROM HIS FATHER?

A. I THINK HE TALKED ABOUT, AND I WOULD HAVE TO LOOK BACK, I THINK HE TALKED ABOUT THE INCIDENT OF THE 911. HE HAD INDICATED, I THINK BUT I'M NOT SURE, THAT WAS THE TIME THAT HE INDICATED THAT HIS FATHER BROKE A PADDLE ON HIM. AND THEN LATER GOT INTO

LEAVING BRUISES THAT WERE SEEN [1622] BY A KINDERGARTEN TEACHER. IT'S VERY IMPORTANT THE WAY THAT THAT COMES UP.

Q. WOULD YOU SHARE THAT WITH ME?

A. BECAUSE IT IS DEPRESSED AND SUPPRESSED, AND I THINK THAT THAT IS TRUE OF THE ENTIRE FAMILY BECAUSE IT'S A HISTORY OF ABUSE THAT GOES BACK TO THE ENTIRE FAMILY. SO, THAT PART OF WHAT HAPPENS IS THAT THERE IS A TENDENCY FOR FAMILY MEMBERS NOT TO SEE IT.

Q. WHY WOULD THERE BE A TENDENCY IN A FAMILY WHERE THERE HAS BEEN A HISTORY OF ABUSE FOR THEM NOT TO SEE THE ABUSE?

A. BECAUSE WHAT HAPPENS IS THAT IF THEY HAVE NOT DEALT WITH THEIR OWN ABUSE, THEN WHAT HAPPENS IN DEALING WITH HIS ABUSE AFTER ALL OF THE EMOTIONS AND THINGS THAT GOES ON, THERE'S A TERM CALLED BLINDNESS WHICH MEANS THAT SOMEONE CAN ACTUALLY SEE THE ABUSE, AND THEN JUST BLOCK IT OUT.

Q. IS THAT UNCOMMON FOR SOMEONE WHO HAS BEEN ABUSED TO TRY TO BLOCK OUT THE ABUSE?

A. IT IS NECESSARY FOR THEIR SURVIVAL AT THAT TIME.

Q. WHY IS IT NECESSARY FOR THEIR SURVIVAL?

A. A LOT OF RESEARCH, A LOT THAT IS DONE AT THE SOUTH CAROLINA CRIMINAL RESEARCH

CENTER INDICATES THAT AT THE TIME OF THE ABUSE, THE TYPE OF ABUSE THAT HAS BEEN DESCRIBED, THAT WHAT HAPPENS IS THAT IT IS A SITUATION WHERE A PERSON BELIEVES THAT HE IS GOING TO DIE, IT [1623] CHANGES THEIR WORLD VIEW.

Q. WHY DOES IT CHANGE THEIR WORLD VIEW, AND MAKE THEM BELIEVE THEY ARE GOING TO DIE?

A. BECAUSE WHAT HAPPENS IS THAT WHEN IT HAPPENS AT AN EARLY AGE LIKE THAT WHAT GOES ON IS THAT THEY DID NOT KNOW THE WHOLE SYSTEM OF THE PHYSIOLOGICAL CHANGES THAT WOULD OCCUR.

Q. WHAT PHYSIOLOGICAL CHANGES?

A. PHYSIOLOGICAL CHANGES THAT OCCUR INSIDE OF THEM THAT THEIR ENTIRE ADRENAL SYSTEM IS ACTIVATED; THAT'S PART OF P.T.S., THE POST TRAUMATIC STRESS DISORDER SYNDROME. AND THAT WOULD, I'M SURE, BE WHAT BOTH WESLEY AND HIS SISTER WOULD HAVE GONE THROUGH DURING THAT PERIOD OF TIME. SO, THERE IS THAT COMPONENT, AND THEN THERE IS THE DEPRESSIVE COMPONENT.

Q. WHEN YOU SAY DEPRESSIVE COMPONENT, WHAT DO YOU MEAN BY THAT?

A. PART OF WHAT HAPPENS IS THAT WHEN YOU TALK TO WESLEY ABOUT THINGS LIKE THAT, THE WORDS WITHOUT AFFECT, THAT THERE IS A DEPRESSION THAT SERVES TO TRY TO KEEP ALL OF

THAT PAIN AWAY. AND THEIR IDEA IS THAT THE DEPRESSION DISTRIBUTES THE PAIN OVER TIME. THAT'S ONE OF THE REASONS FOR THE DEPRESSIVE DISORDER. THERE'S BEEN A LOT OF RESEARCH ON THAT.

Q. DID YOU MAKE ANY DIAGNOSIS ON WESLEY AS IT RELATES TO [1624] DEPRESSION?

A. YES. FROM THE HISTORY AND ALL OF THAT I BELIEVE HE HAS AN UNDERLYING PROBLEM WITH DEPRESSION WHICH ALSO AT TIMES MAJOR DEPRESSION, AND IN HIS EARLY CHILDHOOD IN ALL PROBABILITY HE HAD POST TRAUMATIC STRESS DISORDER.

Q. WAS THERE ANY OTHER HISTORY OF THIS TYPE IN HIS FAMILY?

A. YES, THERE WAS. WITHIN THE FAMILY I THINK THAT THERE ARE UNCLES - I KNOW HIS SISTER HAS ALREADY INDICATED THAT THERE IS DEPRESSION WITH THAT.

Q. HOW DOES DEPRESSION EFFECT - HOW DID IT AFFECT WESLEY?

A. WELL, ONE OF THE THINGS IS THAT PART OF WHAT HAPPENS IS THAT THERE ARE NON-COMPLIANCE PROBLEMS. GENERALLY THERE ARE GOING TO BE NON-COMPLIANCE PROBLEMS WITH DEPRESSION.

Q. WHY IS THAT?

A. BECAUSE WHAT HAPPENS IS THE EMOTIONS ARE MOTIVATORS AND YOU DON'T WANT TO

DISCUSS THOSE THINGS. PLUS IF YOU ARE IN A SITUATION IN WHICH YOU CANNOT LET YOUR ANGER OUT, THEN ONE OF THE WAYS OF GETTING BACK WOULD BE BY BEING PASSIVE AGGRESSIVE, BY NOT FOLLOWING THROUGH.

Q. WHAT'S PASSIVE AGGRESSIVE?

A. BY SIMPLY NOT FOLLOWING THROUGH. IN OTHER WORDS, THERE WOULD BE A LIST OF DUTIES THAT WOULD NEED TO BE OCCURRING IN THE HOUSEHOLD, SO WHAT WOULD HAPPEN IS THAT BECAUSE YOU COULD NOT TAKE ON THE AUTHORITY FIGURE, WHAT HAPPENS IS YOU WOULD SIMPLY NOT COMPLY, AND THAT IS ONE [1625] OF THE WAYS YOU CAN AT LEAST HAVE SOME FEELING.

Q. LET ME ASK YOU, WHAT IS THE DIFFERENCE BETWEEN OTHERWISE RELATIVELY, YOU KNOW, PSYCHOLOGICALLY NORMAL PERSONS SAYING I'M FEELING DEPRESSED AND SOMEONE WHO IS SUFFERING FROM STYMIED DEPRESSION. WHAT'S THE DIFFERENCE BETWEEN THOSE TWO?

A. THE STYMIED NEVER GOES AWAY WOULD BE THE BEST DESCRIPTION OF IT. IT IS GOING TO BE THERE, AND AT TIMES IT WOULD BE MAJOR AND WOULD AFFECT ALL AREAS OF HIS LIFE. AND TYPICALLY WITH POST TRAUMATIC STRESS DISORDER ALSO THERE CAN BE IMPULSE CONTROL PROBLEMS IN ACTING OUT THEIR ANGER.

Q. WAS THERE ANGER IN WESLEY SHAFER THAT YOU FOUND?

A. YES.

Q. WHAT DID YOU FIND WAS THE SOURCE OF THAT?

A. THE ABUSE.

Q. AND SPECIFICALLY WHAT ABUSE WERE YOU ABLE TO FIND THAT YOU FEEL WAS THE SOURCE OF THAT ANGER?

A. THE ABUSE ON THE PART OF HIS DAD WHICH I THINK HAS BEEN, YOU KNOW, REITERATED HERE.

Q. NOW, WHAT DID YOU DO TO INSURE OR WHAT ABOUT YOUR TREATMENT BROUGHT YOU TO THE CONCLUSION THAT THE ABUSE DID IN FACT HAPPEN?

A. I DO NOT BELIEVE THAT THE ABUSE IS FAKED BY WESLEY.

Q. YOU DON'T THINK IT IS WHAT?

[1626] A. THAT IT IS FAKED. I DON'T BELIEVE THAT HE MADE THAT UP.

Q. WHY IS THAT?

A. THE WAY IT WAS PRESENTED. THAT TYPICALLY IN SITUATIONS OF ABUSE WHAT HAPPENS IS THAT THE CHILD WILL TAKE ON MORE RESPONSIBILITY FOR THE ABUSE.

Q. WHAT DO YOU MEAN BY THAT, TAKE ON MORE RESPONSIBILITY?

A. THEY WILL BLAME THEMSELVES. AND ONE OF THE REASONS THAT PEOPLE DO THAT IS

BECAUSE TO LIVE IN THE ENVIRONMENT THAT IS LIKE A WAR ZONE, IT IS DIFFICULT TO DO THAT, YOU CAN'T DO THAT, AND YOU CAN'T LIVE WITH A VIEW OF YOUR DAD AS A GOOD DAD AND A BAD DAD. AND IF YOU ALSO ARE BEING TOLD THAT EVERYTHING IS YOUR FAULT, THEN TO ESCAPE IT WHAT HAPPENS IS YOU TAKE THAT ON. IF YOU TAKE IT ON, THEN YOU BELIEVE THAT YOU HAVE SOME CONTROL OVER IT, SO MAYBE IF I'M A BETTER PERSON - WHEN HE STARTS TALKING ABOUT IT, THERE IS NOT ENOUGH BLAME PLACED ON THE FATHER. SO, WHEN HE STARTS TALKING ABOUT IT, THERE WOULD BE A CLASSIC SYMPTOM IN THAT HE WOULD BLAME HIMSELF AND SAY, WELL, I WAS A BAD KID. OR HE BECOMES PASSIVE, AND WILL NOT TALK ABOUT IT. SO, HOW HE PRESENTED IT WAS REAL IMPORTANT AS FAR AS BEING BELIEVABLE.

ALSO, THAT WAS TRUE OF HIS SISTER AND HIS MOTHER IN THAT ON A NUMBER OF OCCASIONS I TRIED TO GET THEM TO TALK ABOUT IT, AND JUST TO WRITE ABOUT IT BECAUSE IT WAS [1627] NECESSARY FOR HIS TREATMENT. BUT IT WAS NOT SOMETHING THAT THEY COULD DO.

Q. THAT THEY COULD DO?

A. THEY COULDN'T DO.

Q. OKAY. WAS THERE A TIME THAT YOU ASKED FOR WESLEY'S PARENTS' ASSISTANCE IN YOUR COUNSELING?

A. I DID.

Q. AND WHAT WAS THE ASSISTANCE THAT YOU ASKED FOR FROM HIS PARENTS?

A. AFTER WRITING TWO OR THREE LETTERS TO PROBATION AND PAROLE INDICATING THAT HE WAS NOT COMPLYING, AND THAT I WAS VERY CONCERNED ABOUT HIM, I ASKED HER IF SHE WOULD BE WILLING TO COME IN BECAUSE I NEEDED TO TALK WITH HER ABOUT SOME THINGS THAT HAD COME UP, AND I FELT LIKE SHE MAY HAVE MORE HISTORY.

Q. WHAT WERE YOU PLANNING ON TALKING TO HER ABOUT?

A. ABOUT THE ABUSE.

Q. AND WHEN YOU CONFRONTED HER WITH THE ABUSE, AND ASKED HER TO COME IN, DID SHE COME IN?

A. SHE TOLD ME AT THAT TIME THAT THEY HAD BEEN THROUGH SO MUCH WITH WESLEY THAT SHE WOULD RATHER FOR HIM TO CARRY ON THE COUNSELING ON HIS OWN.

Q. WELL, DID YOU EVER HAVE AN OPPORTUNITY TO TALK WITH HIS FATHER?

A. NO, I DID NOT.

[1628] Q. WHAT DID YOU ULTIMATELY DETERMINE WAS THE BASIS FOR WESLEY'S PROBLEM, FOR LACK OF A BETTER WORD.

A. THE BASIS FOR HIS PROBLEM, I BELIEVE, WAS THE TRAUMA, THE PHYSICAL ABUSE THAT HE

HAD ENDURED AS A CHILD, AND NOT ONLY HAD NOT DEALT WITH, BUT HAD USED ALCOHOL AND DRUGS IN ORDER NOT TO DEAL WITH IT,

Q. AND IS THE USE OF ALCOHOL AND DRUGS, I MEAN IS IT COMMON TO SEE THAT IN A PERSON WHO HAS BEEN ABUSED?

A. IT IS BECAUSE THEY BASICALLY KEEP ALL THE ANGER AND ALL THEIR EMOTIONS DOWN AND WHAT YOU END UP WITH IS A SITUATION WHERE YOU'VE GOT WHEN THEY DO COME OUT, THEY COME OUT WITH A VENGEANCE. AND THAT'S WHAT HAPPENED WITH WESLEY.

Q. HOW DOES ALCOHOL AND DRUGS HELP SOMEONE TO SUPPRESS THEIR ANGER?

A. ALCOHOL SUPPRESSES FEELINGS, AND IT WORKS FOR A SHORT PERIOD OF TIME. WHAT HAPPENS IN A 24 TO 48 HOUR PERIOD THEN THERE IS A GREATER INCREASE OF ANXIETY, AND THEN WHEN YOU GET TO AN ADDICTIVE LEVEL WHICH HE WAS AT, THEN WHAT HAPPENS IS YOU'RE THEN VERY, VERY PRONE TO PERIODS OF EXTREME EXPLOSIVENESS. THE POTENTIAL IS THERE BECAUSE THERE IS NO CONTROL OVER THE IMPULSES AT THE LEVEL OF ADDICTION THAT HE HAD.

Q. NOW, WHEN IS THE LAST TIME THAT YOU SAW WESLEY SHAFER, YOU KNOW, OBVIOUSLY BEFORE YOU CAME TO THE COURTROOM [1629] TODAY?

A. THE LAST TIME I SAW HIM WAS IN OCTOBER OF THIS YEAR IN JAIL, '97.

Q. AND WHAT DID HE SHARE WITH YOU AT THAT TIME?

A. AT THAT TIME HE BEGAN TO TALK ABOUT THE EXTENT OF THE ALCOHOL AND DRUG ABUSE THAT WAS GOING ON.

Q. IS THERE ANYTHING ABOUT WHAT HE TOLD YOU THEN THAT CAUSED YOU TO DOUBT ANYTHING THAT YOU FOUND BEFORE HE WAS ARRESTED?

A. NO. I BELIEVED WHAT HE WAS SAYING. HE TOLD ME ABOUT THE USAGE BACK IN MARYLAND. HE TOLD ME WHAT HE HAD USED IMMEDIATELY BEFORE THIS INCIDENT OCCURRED.

Q. WHAT DID HE TELL YOU HE USED?

A. HE HAD USED L.S.D.; HE HAD USED MARIJUANA; HE WAS DRINKING IMMEDIATELY PRIOR TO THAT. AND WHEN YOU PUT ALL OF THAT TOGETHER, IT'S A REAL EXPLOSIVE COMBINATION.

Q. PRIOR TO THE SHOOTING, THE MURDER THAT BROUGHT WESLEY SHAFER HERE, WHAT HELP DID YOU REQUEST FROM HIS PARENTS?

A. WELL, I HAD ASKED THEM TO – WELL, I MET WITH HIS MOTHER, AND ASKED HER TO SIT DOWN AND WRITE UP WHAT HAD HAPPENED TO WESLEY IN THE HOME. AND THE REASON I ASKED HER TO WRITE THAT UP IS BECAUSE IT IS SUCH A DIFFICULT PROCESS IF THERE HAS BEEN ABUSE WITHIN A FAMILY ORIGIN, AND EVEN IF THERE HASN'T BEEN IN HER FAMILY ORIGIN, JUST THE ABUSE THAT SHE HAS WITNESSED, THAT SHE WOULD TEND TO [1630]

KEEP IT OUT OF HER AWARENESS. IF THERE IS ABUSE OF WESLEY OR ABUSE OF JENNY, SHE WILL TRY TO KEEP THAT OUT OF HER MIND. ONE OF THE REASONS FOR HER WRITING ABOUT IT IS THAT WHAT HAPPENS IS THAT YOU CAN TALK TO SOMEONE ABOUT THAT, AND IT WILL BE GONE WITHIN FIVE MINUTES OF TALKING, BUT WRITING SORT OF LINKS IT TOGETHER AND GENERALLY WILL BRING UP A WHOLE RECOLLECTION OF INCIDENTS. THAT'S THE REASON I ASKED HER TO DO THAT, AND ALSO JENNY.

Q. IS WHAT YOU FOUND OUT FROM – WELL, ULTIMATELY FOUND OUT FROM WESLEY'S FAMILY, IS THAT CONSISTENT WITH A FAMILY WHERE THERE IS ABUSE?

A. YES.

Q. AND WHAT IS THE LONG TERM EFFECT ON A CHILD WHO HAS GROWN UP IN A HOUSEHOLD SURROUNDED WITH ABUSE?

A. WELL, THERE IS PLENTY OF EVIDENCE THAT INDICATES THAT IT DOES HAVE A LONG TERM EFFECT. THERE PROBABLY IS PSYCHIATRIC DISORDERS THAT ARE INCREASED, PROBABLY SUBSTANCE ABUSE DISORDERS INCREASE. THERE IS A GREAT DEAL OF INFORMATION ON THIS.

Q. WAS OR WERE YOUR FINDINGS AS THEY RELATED TO WESLEY SHAFER CONSISTENT WITH A CHILD WHO HAD GROWN UP IN A HOUSEHOLD OF ABUSE?

A. THEY WERE.

Q. I HAVE NO FURTHER QUESTIONS, YOUR HONOR.

[1631] **THE COURT:** CROSS EXAMINATION?

CROSS EXAMINATION BY

MR. POPE:

Q. MR. GOLDSMITH, COULD YOU TELL ME WHAT INFORMATION YOU RELIED ON IN PRESENTING YOUR FINDINGS HERE TODAY?

A. WHAT INFORMATION?

Q. YES. CAN YOU TELL THE JURY WHERE YOU GOT THE DATA THAT YOU BASED YOUR OPINIONS ON?

A. THE INFORMATION THAT I GOT WAS FROM THE INTERVIEWS WITH WESLEY. THE M.M.P.I. TESTING; THE INTERVIEW WITH THE MOTHER. THERE WERE NO RECORD THAT WAS SENT FROM HAZEL PITTMAN.

Q. SO, YOU DIDN'T REVIEW ANY EVALUATIONS THAT HAD BEEN DONE UP IN MARYLAND?

A. NO.

Q. WOULD YOU AGREE WITH ME THAT THAT CERTAINLY COULD ASSIST IN GIVING YOU A MORE FULL EVALUATION?

A. YES. ANYTHING THAT IS AVAILABLE, IT WOULD BE A GOOD IDEA TO HAVE IT.

Q. BUT ANY DOCUMENTATION OR ANYTHING THAT WAS OUT THERE, YOU DIDN'T REVIEW THAT. YOU JUST TALKED WITH THEM AND DID YOUR OWN TESTING?

A. THAT'S CORRECT, I DID NOT HAVE THE BENEFIT OF ANYTHING ELSE.

Q. I TRIED TO WRITE DOWN THE CHRONOLOGY IF YOU COULD HELP [1632] ME. TELL THE JURY AGAIN WHEN YOU WERE FIRST INVOLVED WITH WESLEY SHAFER?

A. THAT WAS IN AUGUST OF '96.

Q. OKAY, DO YOU KNOW FROM YOUR INFORMATION FROM YOUR EVALUATION OF WHEN HE WAS FIRST REFERRED TO HAZEL PITTMAN?

A. I DO NOT HAVE WHEN HE WAS FIRST REFERRED TO HAZEL PITTMAN.

Q. I'LL SHOW YOU THIS DOCUMENT AND ASK YOU TO LOOK AT THAT, AND TELL ME IF THAT APPEARS TO BE ACCURATE?

A. 4-10-96 PROBATION REPORT OF RICK WILLIAMS.

Q. SO, WE'RE TALKING ABOUT THE SAME INCIDENT?

A. THAT'S RIGHT.

Q. I'LL SHOW YOU THIS DOCUMENT WHICH APPEARS TO BE A SIMILAR REFERRAL DOCUMENT AND ASK YOU IF YOU CAN IDENTIFY THAT?

A. INTAKE 2-29-96, ASSESSMENT 7-3-96, CASE MANAGEMENT 7-22-96. WESLEY IS INAPPROPRIATE FOR SERVICES AT OUR AGENCY AND THEY REFERRED HIM TO ME.

Q. IS THAT ACCURATE?

A. YES, EXCEPT FOR THE PIEDMONT MEDICAL.

Q. IT SAYS "PAT GOLDSMITH AT PIEDMONT MEDICAL IN ROCK HILL, SOUTH CAROLINA"?

A. YES. I WORK THERE ONE DAY A WEEK.

Q. YOU'RE ACTUALLY IN LANCASTER?

[1633] A. YES.

Q. YOUR HONOR, I WOULD HAVE THIS MARKED AS A STATE'S EXHIBIT.

MR. NETTLES: NO OBJECTION, YOUR HONOR.

THE COURT: IT WILL BE RECEIVED.

(THE REPORT WAS MARKED STATE'S EXHIBIT 56.)

Q. OKAY, DOCTOR, YOU READ THIS. I WANT YOU TO INDICATE TO THE JURY THE REFERRAL LANGUAGE FOR SEXUAL OFFENDER COUNSELING DUE TO HAVING NO ALCOHOL OR OTHER DRUG ABUSE - COULD YOU READ SPECIFICALLY THE REFERRAL LANGUAGE WHY HE WAS SENT TO YOU?

A. "WESLEY IS INAPPROPRIATE FOR SERVICES AT OUR AGENCY DUE TO HAVING NO REPORTED PROBLEMS WITH ALCOHOL AND OTHER DRUG ABUSE. WE REFERRED WESLEY FOR SEXUAL

OFFENDER COUNSELING TO PAT GOLDSMITH AT PIEDMONT MEDICAL IN ROCK HILL, S. C.".

Q. AND THEN IT WAS AUGUST OF '96 WHEN YOU FIRST SAW HIM; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. DID YOU SET UP A PROGRAM WITH YOUR OFFICE WITH HIM AT THAT TIME?

A. I DID.

Q. AND IN SEPTEMBER OF '96 DID YOU NOTIFY THEM THAT HE HADN'T COME TO ANY MORE COUNSELING FOR TREATMENT?

A. THAT'S CORRECT.

[1634] Q. I'LL SHOW YOU WHAT'S BEEN MARKED STATE'S EXHIBIT 57 FOR IDENTIFICATION, AND ASK IF YOU CAN IDENTIFY THIS?

A. THIS IS A LETTER THAT I SENT TO RICK WILLIAMS, DEPARTMENT OF PROBATION AND PAROLE, WHICH INDICATES WESLEY'S TREATMENT DEALING WITH SEXUAL ABUSE IS SCHEDULED FOR AUGUST 6 AND SEPTEMBER 2, 1996 AND HE WILL BE ATTENDING ON AN EVERY OTHER WEEK BASIS, AND HIS NEXT APPOINTMENT WAS SCHEDULED FOR SEPTEMBER 18TH. AND I THINK THERE ARE SEVERAL LETTERS THAT I SENT OUT AFTER THAT INDICATING THAT HE HAD FAILED TO SHOW UP FOR SEVERAL APPOINTMENTS.

Q. AND ON THIS PARTICULAR DOCUMENT YOU HAVE A HANDWRITTEN NOTE -

A. THAT SAYS "DID NOT SHOW FOR HIS APPOINTMENT".

Q. DID YOU DISCONTINUE HIM JUST FOR HIM MISSING ONE APPOINTMENT?

A. NO, HE WASN'T DISCONTINUED. PART OF WHAT HAPPENS IS - I THINK THAT WAS 9-18-96. HE CAME AGAIN ON 9-24, 10-9; HIS MOTHER INDICATED THAT HE COULD NOT COME FOR ONE APPOINTMENT; 11-27 HE FAILED TO SHOW FOR AN APPOINTMENT. SO, THERE WAS A CALL MADE TO PROBATION AND PAROLE ON 9-2-96 INDICATING THAT HE WAS NOT COMPLYING WITH THE TREATMENT.

Q. SO, THE DOCUMENT I HAVE MARKED STATE'S EXHIBIT 57 FOR IDENTIFICATION REALLY JUST REFERS TO ONE OF THE [1635] APPOINTMENTS HE MISSED, BUT THAT DOESN'T COVER THE WHOLE PICTURE?

A. NO.

Q. PRIOR TO THIS INCIDENT, ROUGHLY FROM AUGUST '96 ON UP THROUGH THE END OF '96 THAT'S WHEN YOU WERE SEEING HIM. YOU SAID THERE WERE SOME APPOINTMENTS HE DID COME TO?

A. RIGHT. THE LAST APPOINTMENT WAS 12-18-96. AT THAT TIME HE HAD BASICALLY INDICATED THAT THERE WERE NO PROBLEMS. I HAD BASICALLY TOLD HIM THERE WERE PROBLEMS. SUBSEQUENTLY HE INDICATED THAT HE WANTED TO PROVE THAT HE DIDN'T HAVE ANY PROBLEMS.

AND I SAID I'LL BE GLAD TO DO THAT IF WE CAN DO SOME TESTING. AND THAT'S WHEN THE TESTING OCCURRED AT THAT TIME.

Q. WHEN YOU SAY "AT THAT TIME", WHAT WAS THE DATE OF THAT TESTING?

A. 12-18-96.

Q. AND SUBSEQUENTLY ON 12-30-96 - I'LL SHOW YOU STATE'S EXHIBIT 58 FOR IDENTIFICATION AND ASK IF THIS IS A LETTER ON YOUR LETTERHEAD AND IN YOUR HANDWRITING?

A. THAT'S CORRECT.

Q. WOULD YOU TELL THE JURY WHAT THAT INDICATES?

A. IT INDICATES ON 12-18-96 HE HAD REQUESTED AN ASSESSMENT TO DETERMINE IF HE HAD A SEXUAL PROBLEM. HE WAS GIVEN THE T.A.T. AND D.A.P. TEST; HE WAS ALSO TO COMPLETE AND RETURN THE M.M.P.I. I ASKED HIS MOTHER TO COME IN TO [1636] COMPLETE SOME BACKGROUND INFORMATION; DISCUSSED WITH HIM THE CONSEQUENCES OF FAILURE TO FOLLOW THROUGH WITH COUNSELING IF THERE IS A DIAGNOSIS OF A SEXUAL PROBLEM; TO SET UP A PAYMENT PLAN FOR OUR OFFICE. WE FINALLY HAD TO - I THINK I HAD TO CALL HIM TO GET THE M.M.P.I., BUT WE FINALLY GOT THAT BACK.

Q. YOU WROTE ON HERE THAT "AS OF THIS DATE, HE HAS COMPLIED WITH NONE OF THESE".

A. THAT'S CORRECT.

MR. POPE: I WOULD MOVE STATE'S EXHIBIT 58 FOR IDENTIFICATION INTO EVIDENCE.

MR. BANKS: WITHOUT OBJECTION.

THE COURT: IT WILL BE RECEIVED.

(THE LETTER FROM DR. GOLDSMITH TO PROBATION AND PAROLE DATED 12-30-96 WAS MARKED IN EVIDENCE AS STATE'S EXHIBIT 58 WITHOUT OBJECTION.)

Q. I'LL SHOW YOU WHAT HAS BEEN MARKED AS STATE'S EXHIBIT 59 FOR IDENTIFICATION, IF YOU WOULD TAKE A LOOK AT THAT.

A. YES, THIS IS DATED 2-4-97, A HANDWRITTEN NOTE TO RICK WILLIAMS, HIS PROBATION OFFICER, THAT INDICATED HE HAD COMPLETED HIS EVALUATION, AND IS PRESENTLY NON-COMPLIANCE IN ALL OTHER AREAS ADDRESSED IN THE LETTER SENT TO YOU IN JANUARY.

Q. OKAY. WE WOULD OFFER THAT AS STATE'S EXHIBIT 59.

MR. BANKS: WITHOUT OBJECTION.

[1637] **THE COURT**: IT WILL BE RECEIVED.

(THE LETTER WAS MARKED STATE'S EXHIBIT 59 IN EVIDENCE WITHOUT OBJECTION.)

MR. POPE: YOUR HONOR,I HAD PREVIOUSLY MOVED STATE'S EXHIBIT 58 IN, I THINK THAT WAS WITHOUT OBJECTION. STATE'S EXHIBIT 57 WAS THE ONE THAT HE INDICATED ONLY SHOWED ONE MISSED APPOINTMENT, AND I DID NOT MOVE THAT

INTO EVIDENCE, BUT I WILL MOVE IT IN AT THIS TIME JUST FOR CONTINUITY.

THE COURT: ANY OBJECTION?

MR. NETTLES: WITHOUT OBJECTION.

THE COURT: IT WILL BE RECEIVED.

(STATE'S EXHIBIT 57 FOR IDENTIFICATION WAS MARKED IN EVIDENCE AS STATE'S EXHIBIT 57 WITHOUT OBJECTION.)

Q. DOCTOR, YOU INDICATED THAT HE CAME TO SEE YOU FOR SOME APPOINTMENTS; IS THAT CORRECT.

A. THAT'S CORRECT.

Q. APPROXIMATELY HOW MANY TIMES DID YOU SEE HIM PRIOR TO THIS CRIME?

A. I SAW HIM SIX TIMES PRIOR TO THE CRIME, AND ONE TIME AFTER THE CRIME.

Q. AND YOUR SEEING HIM AFTER THE CRIME, WAS THAT AT THE DEFENSE REQUEST?

A. AT THE DEFENSE REQUEST TO GO IN AND TALK TO HIM.

Q. THE TIMES THAT YOU SAW HIM PRIOR TO THE CRIME, YOU HAD [1638] INDICATED AT SOME POINT THERE YOU SAW A LEVEL OF ABUSE?

A. THAT'S CORRECT.

Q. AND, AGAIN, THAT WAS BASED ON HIS REPRESENTATIONS TO YOU; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. YOU HAD INDICATED - YOU TALKED ABOUT WORDS WITH NO AFFECT?

A. RIGHT.

Q. YOU SAID WHEN HE RELATED TO YOU, IT WOULD BE ALMOST AS IF HE HAD READ IT IN THE NEWSPAPER. I THINK THAT'S THE WAY YOU PUT IT.

A. YES, SIR.

Q. AND SO THE BASIS OF YOUR OPINION IS BASED ON WHAT YOU HAVE BEEN TOLD BY MR. SHAFER; IS THAT CORRECT?

A. NO, NOT ENTIRELY. THE BASIS OF MY OPINION WAS BASED ON WHAT I HAD BEEN TOLD BY HIM, BUT ALSO THE RESULTS OF HIS TESTING ALSO.

Q. THE TESTING THAT YOU DID?

A. THAT'S RIGHT.

Q. NOT ANY OTHER TESTING OR ANY OTHER EVALUATIONS THAT WERE DONE?

A. THAT'S CORRECT.

Q. YOU INDICATED HE HAD AN AUTHORITY CONFLICT; IS THAT CORRECT?

A. I INDICATED THAT HE ALSO INDICATED THAT HE HAD AN [1639] AUTHORITY CONFLICT.

MR. POPE: I BEG THE COURT'S INDULGENCE. (AFTER A BRIEF PAUSE.)

Q. NO FURTHER QUESTIONS, YOUR HONOR.

THE COURT: ANY REDIRECT?

REDIRECT EXAMINATION BY

MR. NETTLES:

Q. THANK YOU VERY MUCH, YOUR HONOR. WHEN YOU SAY WORDS WITH NO AFFECT, ALMOST LIKE YOU READ IT IN THE NEWSPAPER, WHAT DOES THAT MEAN? WHAT DOES THAT MEAN, THAT PHRASE?

A. THAT THERE HAS BEEN AN AFFECTIVE SPLIT, AND BY THAT I MEAN THAT HE HAS CUT OFF THE EMOTIONS THAT HAVE TO DO WITH THAT.

Q. HOW DO YOU KNOW THAT HE DIDN'T JUST READ IT IN THE NEWSPAPER?

A. BY THE WAY THAT IT COMES OUT, THE WHOLE HISTORY.

Q. IS THAT SOMETHING THAT YOU ARE TRAINED TO LOOK FOR?

A. THAT'S CORRECT.

Q. WHAT TRAINING HAVE YOU RECEIVED THAT ALLOWS YOU TO INTERPRET THE WAY PEOPLE SAY THINGS, AND WHAT IT MEANS?

A. WELL, PRETTY MUCH ALL OF THE BACKGROUND AND TRAINING AND EXPERIENCE I HAVE HAD THAT I RELATED TO THE COURT. ALSO FOR 10 YEARS I HAVE GONE TO THE MASTERS AND JOHNSONS SEXUAL ABUSE SEMINAR AT HILTON HEAD; AND I'VE ALSO [1640] CONDUCTED A GROUP SEMINAR ON ABUSE - ABUSE IS ABUSE WHETHER SEXUAL OR PHYSICAL, THEY ARE ALL BASICALLY THE SAME.

Q. IS IT UNCOMMON FOR SOMEONE WHO IS BEGINNING ALCOHOL AND DRUG TREATMENT FOR THERE TO BE A DENIAL AT FIRST?

A. THE HALLMARK OF ADDICTION IS DENIAL, BASICALLY LYING TO THEMSELVES.

Q. NOW, IS THIS CONSISTENT WITH SOMEONE WHO HAS SUFFERED WITH ABUSE, SUFFERED FROM ABUSE, AND HAS AN ADDICTION PROBLEM FOR THEM TO BE NON-COMPLIANCE ON THEIR APPOINTMENTS?

A. IT IS NOT.

Q. IT IS NOT CONSISTENT?

A. IT IS WHAT YOU WOULD THINK WOULD HAPPEN. ONE OF THE THINGS IS WHEN YOU GET A LOT OF NO SHOWS THE FIRST THING YOU LOOK FOR IS SUBSTANCE ABUSE AND THIS M.M.P.I TESTING INDICATED THAT IT WAS HIGHLY PROBABLE, BUT HE NEVER CAME BACK AFTER THAT.

Q. SO, THAT WOULD BE STATE'S EXHIBIT 56, STATE'S EXHIBIT 58, STATE'S EXHIBIT 57, STATE'S EXHIBIT 59. ARE ALL OF THOSE CONSISTENT WITH SOMEONE WHO – I MEAN IS THAT SOMETHING YOU WOULD EXPECT FROM SOMEONE – LET ME BACK UP A SECOND. WOULD YOU EXPECT THOSE DOCUMENTS TO BE PRODUCED WHEN SOMEONE IS BEING SEEN FOR PHYSICAL ABUSE AND/OR SUBSTANCE ABUSE?

[1641] **MR. POPE:** YOUR HONOR, I AM GOING TO OBJECT; I THINK IT IS EXTREMELY LEADING.

THE COURT: REPHRASE THE QUESTION.

Q. THANK YOU. WHAT IS A DIAGNOSIS THAT THOSE DOCUMENTS COULD BE CONSISTENT WITH AS IT RELATES TO WESLEY?

A. IT COULD BE CONSISTENT WITH ABUSE, AND ALSO ADDICTION. IT IS NOT UNCOMMON. THE PROBATION OFFICER INDICATED, I THINK, THAT HE INDICATED THAT THERE WERE NO PROBLEMS WITH ADDICTION, BUT SINCE DISHONESTY IS THE NUMBER ONE PROBLEM WITH ADDICTION, THEN YOU WOULD THINK THAT HE MAY NOT BE HONEST.

Q. NOW, WHEN YOU SAY DISHONEST, YOU MEAN THE PERSON WILL LIE?

A. IT IS NOT ONLY THAT, BUT THE FACT THAT I'VE LIED ABOUT MYSELF FOR SO MUCH FOR SO LONG THAT I DON'T KNOW WHAT THE TRUTH IS. IT IS A VERY DEEPLY INGRAINED THING. I REALLY BELIEVE THAT HE BELIEVED WHEN HE TOOK THE TEST HE WAS GOING TO COME OUT FINE. THAT'S THE LEVEL OF ADDICTION AND DENIAL THAT WAS GOING ON WITH HIM.

Q. HOW CAN YOU RECONCILE THE DISHONESTY ABOUT THE ALCOHOL WITH BEING ABLE TO RELY ON HIS REPORTING?

A. I'M SORRY; SAY THAT AGAIN?

Q. HOW CAN YOU RECONCILE –

MR. POPE: YOUR HONOR, I'M GOING TO OBJECT TO THAT QUESTION, HOW CAN YOU RECONCILE. THAT IS IMPROPER. HE CAN [1642] ASK WHAT HE DETERMINES FROM IT.

Q. WHAT CAN YOU DETERMINE FROM THE FACT THAT WESLEY WAS, AS YOU SAID, LYING TO HIMSELF ABOUT HIS ALCOHOL PROBLEM, BUT YET YOU STILL FELT COMFORTABLE RELYING ON HIS SELF-REPORTING OF ABUSE?

A. WELL, I THINK HE WAS AT SOME LEVEL LYING. I MEAN HE WAS LYING ABOUT BOTH, I BELIEVE. I THINK HE WAS LYING ABOUT THE ALCOHOL, I THINK HE WAS LYING ABOUT THE ABUSE. WHEN I SAY THAT, I THINK HE WAS LYING ABOUT HIS PART IN IT, NOT BLAMING THE PERSON WHO DID THAT. AND FREQUENTLY IN DEALING WITH THIS, BECAUSE A PERSON BELIEVES THAT THEY COULD DIE WHEN YOU'RE A KID AND THIS HAPPENS, THAT WHEN THEY TRY TO GET BACK TO IT AS AN ADULT, IT CAN BE THE SAME WAY. SO, IT IS NOT UNCOMMON FOR PEOPLE WITHOUT ADDICTION PROBLEMS TO HAVE THAT REACTION AS SOON AS YOU TOUCH ABUSE; TO BAIL OUT AS SOON AS YOU TOUCH ABUSE.

Q. ARE YOU THEN MAKING A DIAGNOSIS THAT YOU BELIEVE WESLEY IS A LIAR?

A. AM I MAKING A DIAGNOSIS?

Q. THAT WESLEY IS A LIAR.

MR. POPE: YOUR HONOR, AGAIN, I AM GOING TO OBJECT. HE HAS ASKED HIM WHAT HIS DIAGNOSIS IS, BUT HE IS TESTIFYING.

THE COURT: REPHRASE THE QUESTION.

Q. LET ME POSE YOU A HYPOTHETICAL QUESTION.

A. OKAY.

[1643] Q. IF HYPOTHETICALLY SOMEONE WERE TO SAY WESLEY SHAFER, BECAUSE HE LIED ABOUT HIS ABUSE AND LIED ABOUT HIS ALCOHOL ADDICTION TO HIS COUNSELOR, DOES THAT MEAN HIS COUNSELOR WOULD THINK HE IS A LIAR?

A. I THINK HIS COUNSELOR COULD THINK HE IS LYING, BUT IT WOULD BE MORE COMPLICATED THAN THAT.

Q. WHY?

A. BECAUSE OF ALL OF THE THINGS THAT I HAVE JUST SAID. BECAUSE OF THE DEFENSE MECHANISM, THE SUPPRESSION, DEPRESSION, DENIAL. PART OF WHAT HAPPENED IS HE WAS PROJECTING BLAME ON ANY AUTHORITY WHETHER IT WAS PROBATION AND PAROLE OR WHETHER IT WAS ME. THAT'S PART OF WHAT HAPPENS IN AN AFFECTIVE DISORDER.

Q. THANK YOU VERY MUCH.

RECROSS EXAMINATION BY

MR. POPE:

Q. MR. GOLDSMITH, IF I UNDERSTAND YOUR TESTIMONY, THE DEFENDANT CAME TO YOU FROM HAZEL PITTMAN?

A. THAT'S CORRECT.

Q. AT HAZEL PITTMAN THERE WAS A DETERMINATION OR EITHER HE REPRESENTED THAT THERE WAS NO DRUG PROBLEM; IS THAT CORRECT?

A. YES.

Q. HE CAME TO YOU, AND AS I UNDERSTAND WHAT YOU ARE TELLING THIS COURT, YOUR DETERMINATION WAS BASED THROUGH YOUR [1644] EXPERIENCE, AND IN ANALYZING HIM, AND THE TESTS THAT YOU GAVE, THAT YOU DETERMINED THAT YOU DID IN FACT BELIEVE WHAT HE WAS RELATING TO YOU. IS THAT CORRECT?

A. THAT'S CORRECT.

Q. MR. GOLDSMITH, YOU HAVE BEEN WRONG BEFORE ABOUT WHAT SOMEONE HAS REPRESENTED TO YOU, HAVE YOU NOT?

MR. NETTLES: OBJECTION; THIS IS IMPROPER RECROSS.

THE COURT: I OVERRULE THE OBJECTION.

A. I HAVE BEEN WRONG; YES, SIR.

Q. THANK YOU.

THE COURT: YOU MAY STEP DOWN, AND BE EXCUSED.

* * *

[1681] **THE COURT:** CALL YOUR NEXT WITNESS.

MR. BANKS: THANK YOU, YOUR HONOR. ON BEHALF OF WESLEY SHAFER THE DEFENSE CALLS LIEUTENANT COLONEL DAVID GROSSMAN

THE COURT: STEP UP, AND BE SWORN.

DAVID A GROSSMAN, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY

MR. BANKS:

Q. STATE YOUR FULL NAME TO THE JURY, SIR.

A. LIEUTENANT COLONEL DAVID GROSSMAN.

Q. AND WHERE DO YOU LIVE?

A. IN JONESBORO, ARKANSAS.

[1682] **DAVID A. GROSSMAN – DIRECT BY MR. BANKS**

Q. DID YOU JUST FLY INTO CHARLOTTE A COUPLE OF MINUTES AGO?

A. YES, I DID.

Q. WHAT IS YOUR OCCUPATION?

A. I AM AN ARMY OFFICER, AND A PSYCHOLOGIST.

Q. AND WHAT IS YOUR PARTICULAR AREA OF EXPERTISE IN PSYCHOLOGY?

A. THE PSYCHOLOGICAL EFFECTS OF VIOLENCE AND WHY PEOPLE KILL.

Q. ARE YOU A DOCTOR?

A. NO, I AM NOT; I AM IN THE PROCESS OF WORKING ON MY DOCTORATE RIGHT NOW. I'VE BEEN IN THE ARMY FOR THE LAST 23 YEARS.

Q. AND YOU RECENTLY RETIRED?

A. I'M SORRY?

Q. AND YOU RECENTLY RETIRED FROM THE ARMY?

A. YES, I DID; I RETIRED FROM THE ARMY LAST FRIDAY.

Q. WHAT IS YOUR RANK?

A. LIEUTENANT COLONEL.

Q. AND WHAT IS THE NEXT RANK AFTER LIEUTENANT COLONEL - WHAT WAS THE LAST AND WHAT WAS THE NEXT ONE?

A. WELL, I STARTED AS A PRIVATE, AND SERGEANT; AND THEN IN THE OFFICER RANKS THERE'S FIRST AND SECOND LIEUTENANT, AND THEN CAPTAIN, MAJOR, AND THE TWO RANKS OF COLONEL, LIEUTENANT COLONEL AND FULL COLONEL. SO, BEFORE ME LIES FULL COLONEL AND THEN GENERAL. BUT I STEPPED OFF AT [1683] THAT.

Q. WHAT WAS YOUR LAST JOB IN THE ARMY?

A. I WAS THE PROFESSOR OF MILITARY SCIENCE, AND THE CHAIR OF THE DEPARTMENT OF MILITARY SCIENCE AT ARKANSAS STATE UNIVERSITY.

Q. WHAT IS YOUR EDUCATIONAL BACKGROUND?

A. I STARTED WITH A ASSOCIATE DEGREE WITH MY FREE TIME AT FAYETTEVILLE STATE UNIVERSITY OUTSIDE OF FORT BRAGG; AND THEN I RECEIVED MY BACHELORS DEGREE FROM COLUMBUS COLLEGE IN COLUMBUS, GEORGIA.

Q. AND WERE YOU A MEMBER OF ANY HONOR SOCIETIES AT THOSE COLLEGES?

A. YES, I GRADUATED WITH A DEGREE IN HISTORY, PHI KAPPA PHI, SUMMA CUM LAUDE WITH A 4.0 GPA.

Q. AND YOU GRADUATED WITH HONORS?

A. YES, I DID.

Q. WHAT WAS YOUR GPA?

A. 4.0. -

Q. WHEN DID YOU GRADUATE FROM COLUMBUS COLLEGE?

A. 1984.

Q. HAD YOU JOINED THE ARMY PRIOR TO GOING TO COLLEGE?

A. YES, I DID. IN 1974 I ENLISTED; WENT TO SCHOOL - I'VE DONE ALL OF MY SCHOOLING WHILE I'VE BEEN IN THE ARMY.

Q. WHAT DID YOU DO AFTER YOUR UNDERGRADUATE DEGREE?

A. I SERVED A TOUR AS A CAPTAIN IN THE SEVENTH INFANTRY [1684] DIVISION. I HAD TWO YEARS ON THE GENERAL'S STAFF, AND A YEAR AND A HALF IN COMMAND OF AN INFANTRY COMPANY.

Q. DID YOU ULTIMATELY RECEIVE A GRADUATE DEGREE?

A. YES, I DID. I RECEIVED A MASTERS IN EDUCATIONAL PSYCHOLOGY ENROUTE TO TEACHING AT WEST POINT, SERVING AS A PROFESSOR AT WEST POINT.

Q. WHERE DID YOU RECEIVE YOUR MASTERS?

A. UNIVERSITY OF TEXAS AT AUSTIN.

Q. AND WHEN DID YOU GRADUATE?

A. 1990.

Q. WHAT WAS YOUR MAJOR COURSE OF STUDY AT THE UNIVERSITY OF TEXAS?

A. EDUCATIONAL PSYCHOLOGY WHICH FOCUSES ON HOW INDIVIDUALS LEARN.

Q. AND WERE YOU A MEMBER OF ANY HONOR SOCIETIES?

A. YES, I WAS. AGAIN, PHI KAPPA PHI.

Q. AND YOUR GPA FROM TEXAS?

A. 3.9 GPA.

Q. HAVE YOU ATTAINED ANY ACADEMIC APPOINTMENTS AFTER YOU COMPLETED YOUR-MASTERS?

A. YES, I DID. MOST RECENTLY, AGAIN, AS THE PROFESSOR OF MILITARY SCIENCE AND THE DEPARTMENT CHAIR AT THE ARKANSAS STATE UNIVERSITY.

Q. WHAT DO YOU DO THERE IN THAT JOB?

A. I WAS IN COMMAND OF AN ACADEMIC CHAIR, IN CHARGE OF A [1685] VARIETY OF DIFFERENT CLASSES, ABOUT 20 INSTRUCTORS WHO TAUGHT AROUND 600 STUDENTS A YEAR, INSTRUCTIONS IN MILITARY SCIENCE, HISTORY, SMALL ARMS, AND A WIDE VARIETY OF OTHER MILITARY AND LAW ENFORCEMENT ARMS INSTRUCTION.

Q. HAVE YOU ATTAINED ANY OTHER ACADEMIC POSITIONS?

A. YES; I WAS THE ASSISTANT PROFESSOR AT WEST POINT, THE UNITED, STATES MILITARY ACADEMY IN THE DEPARTMENT OF BEHAVIORAL SCIENCES AND LEADERSHIP.

Q. AND WHAT IS BEHAVIORAL SCIENCES AND LEADERSHIP?

A. BEHAVIORAL SCIENCES AND LEADERSHIP IS A DEPARTMENT AT WEST POINT THAT FOCUSES ALSO ON THE PROCESSES OF THE HUMAN MIND, THE INTERACTION, AND FOLLOWING AND LEADING INDIVIDUALS, UNDERSTANDING THEM AND TEACHING THEM THAT WHOLE PROCESS.

Q. HAVE YOU WRITTEN ANY BOOKS, LIEUTENANT COLONEL GROSSMAN?

A. YES, I HAVE.

Q. WHAT WAS THE FIRST ONE?

A. THE FIRST ONE WAS A MILITARY REFERENCE WORK ON THE SEVENTH DIVISION; AND THE OTHER ONE IS ENTITLED ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY.

Q. AND HAVE ANY OF THESE BOOKS BEEN NOMINATED FOR ANY AWARDS?

A. YES. ON KILLING WAS NOMINATED FOR A PULITZER PRIZE FOR [1686] NON-FICTION IN 1995.

Q. WHAT IS THE SUBJECT MATTER OF THE PULITZER NOMINATED BOOK?

A. BASICALLY, IT FOCUSES ON, AND IT IS THE FIRST TIME THAT ANYBODY HAS EVER REALLY DONE IN DEPTH RESEARCH OR IN DEPTH WRITING ON THE PROCESS BY WHICH INDIVIDUALS – THE PROCESSING OF KILLING IN COMBAT, AND WHAT HAPPENS TO INDIVIDUALS WHEN THEY KILL IN COMBAT. I HAVE INTERVIEWED OVER 200 PEOPLE ON THEIR EXPERIENCES OF KILLING, PRIMARILY VETERANS. INCREASING NUMBERS NOW, LAW ENFORCEMENT PERSONNEL, AND CRIMINALS. AND NOTE THE IRRESISTANCE TO KILLING THROUGHOUT HISTORY IN HEALTHY INDIVIDUALS, THE EXISTENCE OF THAT RESISTANCE, HOW THEY HAVE LEARNED TO TURN IT OFF IN THE MILITARY, THE PRICE, AND THE REACTIONS OF INDIVIDUALS WHO

KILL. AND ALSO IN THE LAST SECTION OF THE BOOK AS A CULMINATING SECTION, LOOKED AT HOW WE ARE INDISCRIMINATELY DOING TO OUR CHILDREN WHAT THE MILITARY DOES ON PURPOSE TO TURN THE SAFETY CATCH OFF OF HUMAN BEINGS, IF YOU WILL.

* * *

[1714] Q. WOULD A FAMILY SITUATION THAT INCLUDED ABUSE ENHANCE THE [1715] EFFECT?

A. AGAIN, IT IS THE INTERACTIVE, MULTIPLICITIVE EFFECT IN SO MANY CASES. SO, IF YOU SEE THAT I'M BEING ABUSED, AND THEN YOU SEE ALL THESE PEOPLE ON TELEVISION ARE BEING ABUSED, AND ALL THESE PEOPLE ARE BEATING EACH OTHER UP, THE NET RESULT IS THE CONCEPT OF THE WORLD AGAIN THAT THIS IS IT, THIS IS THE WAY THAT PEOPLE TREAT EACH OTHER; THIS IS THE WORLD, AND THAT'S ALL IT'S EVER GOING TO BE.

Q. DID YOU REVIEW ANY OTHER MOVIES THAT WESLEY SHAFER WATCHED OTHER THAN "FACES OF DEATH"?

A. YES, I DID. THERE WERE MOVIES SUCH AS "JUICE", AND "MENACE TO SOCIETY" – "MENACE TO SOCIETY" IN PARTICULAR IS VERY PERTINENT TO THIS CASE –

Q. WHY IS THAT?

A. TWO REASONS. NUMBER ONE, HE WATCHED IT OVER 50 TIMES. I'VE NEVER SEEN ANY MOVIE IN MY LIFE MORE THAN MAYBE FIVE TIMES. I THINK WHEN I WAS A KID I MAY HAVE WATCHED THE

WIZARD OF OZ ONCE A YEAR FOR FIVE YEARS IN A ROW. IT'S ALMOST BEYOND MY ABILITY TO COMPREHEND, EXCEPT TO KNOW THAT IT IS INCREDIBLY PROFOUND.

A. NOW, IN THE MOVIE – SO, NUMBER ONE, HE SAW IT 50 TIMES. NUMBER TWO, THERE IS A SCENE IN THE MOVIE WHICH IS ASTOUNDINGLY SIMILAR TO WHAT HAPPENED IN THIS CASE.

Q. HAVE YOU SEEN THE VIDEO TAPE IN THIS CASE?

[1716] A. YES.

Q. THE SCENE IN THE MOVIE, HOW IS IT LIKE THE VIDEO THAT YOU VIEWED IN THIS CASE?

A. ALL RIGHT. WHAT HAPPENS IS AN INDIVIDUAL WALKS INTO A STORE. NOW THIS IS A SCENE VERY SIMILAR TO THE MOVIE "JUICE" AS WELL. AN INDIVIDUAL WALKS INTO A STORE AND HAS NO INCLINATION TO KILL. IN THE MOVIE "MENACE TO SOCIETY", THEY HAVE NO INCLINATION TO DO ANYTHING. THEY GO IN THERE, AND THE INDIVIDUAL FINDS HIMSELF OFFENDED BY THE OWNER; THE INDIVIDUAL HAS A WEAPON, AND REFLEXIVELY, WITHOUT EVER THINKING ABOUT IT, AND THAT'S WHAT WE KEEP SEEING OVER AND OVER AGAIN, THE INDIVIDUAL KILLS. THE STORE OWNER DROPS DOWN, AND THEN THE MURDERER LEANS OVER THE COUNTER, PUTS THE WEAPON DOWN AND SHOOTS AGAIN IN A SCENE THAT IS REMARKABLY SIMILAR TO THAT SCENE WHICH I

SAW IN THE VIDEO TAPE OF THE ACTUAL KILLING AND THE CIRCUMSTANCES.

Q. COLONEL GROSSMAN, YOU HAD INDICATED TO THE JURY BY THE PARTICULAR WAY THAT YOU HAD DONE YOUR HAND. IS THAT FROM THE "MENACE TO SOCIETY" AND THE VIDEO TAPE?

A. YES, THAT IS A LEARNED TECHNIQUE. ALL THESE THINGS ARE LEARNED AND POWERFULLY INGRAINED FROM MULTIPLE, MULTIPLE REPETITIONS OF WATCHING THESE MOVIES.

Q. YOU HAD AT ONE POINT INDICATED MOVIES AND VIDEO TAPES, WHAT'S THE DIFFERENCE, HOW DO THEY RELATE TO THE CONCEPT [1717] OF VIOLENCE?

A. I NEED TO LAY A GROUND WORK IN ORDER FOR YOU TO UNDERSTAND. IN WORLD WAR II WHEN WE BECAME AWARE, THIS IS IRREFUTABLY, OF THE FACT THAT THE MAJORITY OF OUR SOLDIERS IN COMBAT SITUATIONS WERE NOT FIRING THEIR WEAPONS AT THE ENEMY. ONCE YOU BECOME FRIGHTENED, ONCE YOU BECOME ANGRY, ONCE THE HEART RATE GOES BEYOND A CERTAIN LEVEL, THE FOREBRAIN CLOSES DOWN AND THE MIDBRAIN, THE BRAIN THAT ALL MAMMALS HAVE IN COMMON, TAKES OVER. HARDWIRED IN THAT MIDBRAIN APPEARS TO BE A RESISTANCE TO KILLING YOUR OWN KIND. EVERY SPECIES HAS A RESISTANCE TO KILLING THEIR OWN KIND. ANIMALS WITH ANTLERS AND HORNS JUST SLAM HEAD TO HEAD WITH EACH OTHER IN THE MOST HARMLESS POSSIBLE FASHION IN THEIR TERRITORIAL MATING

BOUTS, BUT AGAINST OTHER SPECIES THEY GO TO THE SIDE TO GUT AND BORE. PIRANHAS FIGHT ONE ANOTHER WITH FLICKS OF THE TAIL, BUT THEY TURN THEIR FANGS ON EVERYTHING ELSE. RATTLESNAKES WRESTLE ONE ANOTHER, BUT THEY WILL TURN THEIR FANGS ON EVERYONE.

IF A SPECIES DIDN'T HAVE THAT RESISTANCE INDIVIDUALLY, THEN THE SPECIES WOULD DESTROY ITSELF INSIDE OF A COUPLE OF GENERATIONS. IT IS ABSOLUTELY ESSENTIAL FOR THE EXISTENCE OF THE SPECIES. AND IT IS ABSOLUTELY ESSENTIAL IN HUMAN BEINGS. WE RAN ACROSS THAT IN WORLD WAR II. WE BECAME [1718] AWARE OF THE FACT THAT OUR SOLDIERS WEREN'T FIRING. NOW, SOME WOULD AND KEY WEAPONS LIKE A B.A.R. OR A FLAME THROWER WOULD ALWAYS FIRE, AND WEAPONS LIKE MACHINE GUNS WOULD ALWAYS FIRE, BUT THE INDIVIDUAL, THE SOLDIER WAS SCARED OUT OF HIS WITS, AND THEY WOULD NOT FIRE.

SO, AT THE END OF WORLD WAR II WE SAID, HEY, THIS IS NOT GOOD. 15 PERCENT FIRING RATE IN YOUR SOLDIERS IS LIKE A 15 PERCENT LITERACY RATE IN YOUR LIBRARIANS. SO, WE WENT ABOUT THE PROCESS OF FIXING THIS. AND HOW WE FIXED IT WAS A PHENOMENON VERY MUCH LIKE THE VIDEO GAMES WE SEE TODAY, AND THE VIDEO GAMES THAT WESLEY SHAFER PLAYED.

Q. WHAT PHENOMENON IS THAT?

A. WHAT WE DID WAS THIS. WE TOOK THE SOLDIERS, AND WHERE AS IN THE WORLD WAR II

ERA WE FIRED AT THE OLD BULLS EYE TARGETS ON A KNOWN DISTANCE RATE, BY THE KOREAN WAR WE HAD INTRODUCED A REVOLUTION WHICH RAISED THE FIRING RATE TO 55 PERCENT AND BY VIET NAM WE HAD A FIRING RATE OF UP TO 95 PERCENT. AND WHAT WE DID THEN WAS THIS. WE MADE FIRING A CONDITIONED REFLEX.

WHEN PEOPLE ARE FRIGHTENED OUT OF THEIR WITS, IT IS NECESSARY TO PROVIDE THEM A HIGH RATE OF RESPONSES. WE DO IT WITH PILOTS. WE PUT A PILOT UNDER A FLIGHT SIMULATOR, A CERTAIN LIGHT GOES OFF, HE RESPONDS A CERTAIN WAY. WE HAVE HIM DO THAT HUNDREDS OF TIMES. [1719] STIMULUS RESPONSE, STIMULUS RESPONSE, STIMULUS RESPONSE, WARNING LIGHT RESPONSE, ANOTHER WARNING LIGHT RESPONSE. AFTER HUNDREDS OF REPETITIONS, IT BECOMES AN INGRAINED RESPONSE.WHEN THE AIRCRAFT IS GOING DOWN, WHEN EVERYBODY IS SCREAMING, AND HE'S SCARED OUT OF HIS WITS, THE PILOT WILL DO THE RIGHT THING REFLEXIVELY BECAUSE HE HAS BEEN CONDITIONED TO IN THE FLIGHT SIMULATOR.

Q. AND A BULLS EYE ON A RANGE DOES NOT PROVIDE THAT?

A. WE DO IT WITH CHILDREN IN A FIRE DRILL. WE TAKE CHILDREN IN A FIRE DRILL AND FROM A VERY YOUNG AGE THE ALARM BELL GOES OFF AND THEY STAND UP AND THEY TODDLE OUT. ONE DAY THERE'S A REAL FIRE; THEY ARE SCARED OUT OF THEIR WITS; THERE'S SMOKE AND THEY'RE

SCREAMING. THE BELL GOES OFF AND THEY'LL DO EXACTLY WHAT THEY HAVE BEEN CONDITIONED TO DO. WHAT WE DID IS WE CONDITIONED OUR SOLDIERS. THE BULLSEYE TARGET IS NOT WHAT'S GOING TO ATTACK YOU ON THE BATTLEFIELD. WE CHANGED THE TRAINING TO THIS. A MANNEQUIN SILHOUETTE POPS UP IN YOUR FIELD OF VIEW. CONDITIONED RESPONSE, YOU HAVE A SPLIT SECOND TO ENGAGE THE TARGET. STIMULUS FEEDBACK, YOU HIT THE TARGET AND THE TARGET DROPS. STIMULUS RESPONSE, STIMULUS RESPONSE, STIMULUS RESPONSE. HUNDREDS OF REPETITIONS OF THAT IN THE MILITARY AND IN THE LAW ENFORCEMENT COMMUNITY BECAUSE IN THE 1960'S WE DISCOVERED THAT OVER HALF OF [1720] THE LAW ENFORCEMENT OFFICERS IN SITUATIONS WHERE THEY REALLY SHOOT TO PROTECT THEIR OWN LIVES, WERE NOT FIRING. SO, THE LAW ENFORCEMENT COMMUNITY INTRODUCED A PROGRAM WHERE, AGAIN, YOU PRACTICE THE PROCESS OF FIRING AT WHAT YOU ARE GOING TO HAVE TO ENGAGE IN COMBAT.

Q. THE VIDEO GAMES, IS THAT ANALOGOUS TO THE TYPE OF TRAINING THAT LAW ENFORCEMENT AND MILITARY GET?

A. AS A MATTER OF FACT, IN A LOT OF WAYS IT IS BETTER.

Q. WHY?

A. IN THE MILITARY WE USE THOSE MEN SHAPED SILHOUETTES. IN THE VIDEO GAMES THEY

ARE REAL HUMAN BEINGS; THEY ARE VIDEO DEPICTIONS OF REAL HUMAN BEINGS.

ONE GAME THAT WESLEY SHAFER PLAYED EXTENSIVELY IS CALLED LETHAL ENFORCER. AND AS HE PLAYED LETHAL ENFORCER, HE HELD A PISTOL IN HIS HAND, A REVOLVER, VERY MUCH LIKE THE REVOLVER HE USED IN THIS CASE, AND HE POINTED AND SHOT; AND POINTED AND SHOT; AND POINTED AND SHOT LITERALLY THOUSANDS OF TIMES IN THE PLAYING OF THAT GAME.

NOW, WHAT WE DID WITH THE LAW ENFORCEMENT AND THE MILITARY COMMUNITY IS WE MADE IT A CONDITIONED RESPONSE. WE ALLOWED THE INDIVIDUALS WITH GREAT SAFEGUARDS AND GREAT PRECAUTIONS IN THE MILITARY AND LAW ENFORCEMENT WORLD. BUT THE INTERACTIVE VIDEO GAMES ARE INDISCRIMINATELY DOING TO OUR CHILDREN WHAT THE MILITARY [1721] AND LAW ENFORCEMENT WORLD DOES ON PURPOSE, BUT WITHOUT THE SAFEGUARDS.

Q. WERE THERE ANY OTHER VIDEO GAMES OTHER THAN THIS ONE THAT WESLEY SHAFER PLAYED?

A. YES, WHAT YOU HAD WAS A GAME CALLED MORTAL COMBAT WHICH, AGAIN IS A VIOLENT VIDEO GAME. AND WESLEY SHAFER'S SISTER SAID THAT THEY CAME HOME AND PLAYED ONCE A WEEK, IN PARTICULAR, THEY PLAYED MORTAL COMBAT RELIGIOUSLY. SEE, VIOLENCE, WAS THEIR RELIGION. IT WAS BRUTALLY INGRAINED BY THE FATHER; IT WAS TAUGHT BY THE MEDIA. THEIR

MOTOR SKILLS WERE TAUGHT BY THE INDIVIDUAL IN POINT AND SHOOT PROCESSING. AND THE NET EFFECT WAS THAT FROM A VERY YOUNG AGE, VIOLENCE WAS INGRAINED INTO THE INDIVIDUAL.

Q. SOCIETY OFTEN HEARS ABOUT MUSIC, GOOD MUSIC AND BAD MUSIC, DOES MUSIC HAVE ANYTHING TO DO WITH THIS CASE?

A. THE INTERESTING THING ABOUT MUSIC IS THAT WE HAVE GOT OVER 400 SCIENTIFIC STUDIES LINKING VIOLENCE IN THE MEDIA, VISUAL VIOLENCE, AND CRIME, BUT WE REALLY DON'T TO MY KNOWLEDGE HAVE ONE SINGLE SOUND STUDY LINKING MUSIC. THE PRIMARY, THE LEADING THEORY ON MUSIC IS THAT THE MUSIC IS A SYMPTOM, IT'S NOT THE ROOT CAUSE. SOMETHING HAS HAPPENED TO MAKE THESE INDIVIDUALS IDEALIZE VIOLENCE TO THE DEGREE WHERE THE VIOLENT RAP MUSIC AND THE GANGSTER RAP BECOMES ACCEPTABLE AND [1722] DESIRABLE TO THEM. THEY DON'T APPEAR TO BE A CAUSE; THEY APPEAR TO BE MORE OF AN EFFECT.

Q. YOU HAVE DISCUSSED IN YOUR BOOK THE CONCEPT OF THE REVERSE OF CLOCKWORK ORANGE.

A. YES.

Q. WHAT IS THAT?

A. IN THE MOVIE CLOCKWORK ORANGE, SOME OF YOU HAVE SEEN; WELL, WHAT HAPPENED IN CLOCKWORK ORANGE IS THAT THEY TOOK A SOCIOPATH, A MASS MURDERER, AND THEY PUT

HIM IN PRISON AND THEY STRAPPED HIM IN A CHAIR, AND HE'S WATCHING VIOLENT MOVIES WHILE HE IS TRAPPED IN THIS CHAIR. UNBEKNOWNST TO HIM, A DRUG HAS BEEN INJECTED IN HIM WHICH MAKES HIM NAUSEOUS, RIGHT? SO, HE IS SITTING THERE WATCHING VIOLENT MOVIES, AND HE IS RETCHING, AND GAGGING IN RESPONSE TO THESE VIOLENT MOVIES. AFTER HUNDREDS AND HUNDREDS OF REPETITIONS OF THIS, HE BEGINS TO ASSOCIATE VIOLENCE WITH NAUSEA. WHAT WE DO IS A REVERSE CLOCKWORK ORANGE EFFECT.

Q. AND HOW IS THAT?

A. WHAT WE DO IS WE TAKE THE CHILDREN, AND WE HAVE THEM SIT IN MOVIES, AND WE HAVE THEM, LIKE THE GUY IN CLOCKWORK ORANGE, WATCH VIVID DEPICTIONS OF HUMAN DEATH AND SUFFERING, AND LIKE PAVLOV'S DOG, WHAT DO THEY ASSOCIATE IT WITH? THEIR FAVORITE CANDY BAR, THEIR FAVORITE SOFT DRINK, THEIR ARM AROUND THEIR GIRLFRIEND, THEIR [1723] GIRLFRIEND'S PERFUME.

I ASK THEM IN MY CLASSES WHEN I TEACH PSYCH AT WEST POINT AND ARKANSAS STATE UNIVERSITY, I SAY WHAT DOES THE AUDIENCE DO WHEN THEY SEE SOMEBODY BEING DEPICTED AS BEING BRUTALLY, HORRIFICALLY MURDERED ON THE SCREEN, AND THE ANSWER IS ALWAYS THEY CHEER AND THEY LAUGH. WE HAVE LEARNED TO CHEER – NO, WE HAVE TAUGHT OUR CHILDREN TO CHEER AND LAUGH AND DERIVE PLEASURE FROM

HUMAN DEATH AND SUFFERING IN THIS REVERSE CLOCKWORK ORANGE EFFECT. AND THEN THEY PLAY THE VIDEO GAMES, AND THEY LEARN THE MOTOR SKILLS. WE HAVE TAUGHT THEM TO KILL, AND TAUGHT THEM TO LIKE IT, AND THEN WE WONDER WHAT'S HAPPENING.

Q. BASED UPON YOUR RESEARCH IN THIS CASE, AND THE THINGS THAT YOU HAVE REVIEWED, INCLUDING YOUR INTERVIEWS WITH THE SHAFERS, WAS WESLEY SHAFER TAUGHT TO LIKE VIOLENCE IN THE SAME MANNER IN WHICH YOU DESCRIBED?

A. YES.

Q. HAVE THE MOVIES AND VIDEO GAMES THAT HE PLAYED, WOULD THEY HAVE DONE THE SAME THING?

A. ABSOLUTELY.

Q. WOULD THE SUBSTANCE ABUSE THAT HE ADMITTED TO YOU AND OTHERS BEEN ANY TYPE OF SAFETY CATCH?

A. THE SUBSTANCE ABUSE WOULD HAVE MADE HIM MORE VULNERABLE TO OUTSIDE INFLUENCES.

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[1726] Q. COLONEL GROSSMAN, THE CONCEPT OF CONSTANT FEAR OF NO ESCAPE, IS THERE ANY THING ELSE IN YOUR STUDY OF PSYCHOLOGY AND VIOLENCE WHERE IT IS ENHANCED, AGAIN, BECAUSE OF THE CONCEPT OF NO ESCAPE?

A. YES. WE SEE THE SAME THING IN BRAINWASHING, FOR INSTANCE AMONG THE PRISONERS OF WAR; WE SEE THE SAME [1727] THING WHEN THE JAPANESE USE IT WITH THEIR SOLDIERS TO ENABLE THE SOLDIERS TO COMMIT ATROCITIES; WE SEE IT AMONG THE NAZIS WHEN THEY WOULD USE VIOLENT ACTS TO DESENSITIZE THEIR OWN SOLDIERS. THE MILITARY DOES SOME OF IT WHEN WE PROVIDE A ROLE MODEL, THE DRILL SERGEANT IS ESSENTIALLY A BRUTAL ROLE MODEL ALTHOUGH VERY, VERY CAREFULLY NARROWLY ORIENTED. AND, OF COURSE, THE MOTOR SKILLS IN THE MILITARY ARE TAUGHT, AGAIN, LIKE THE VIDEO GAMES.

Q. A COMBINATION OF THE MOTOR SKILLS IN THE VIDEO GAMES, THE VIOLENCE IN THE MOVIES, SOME HE WATCHED 50 TIMES, THE ABUSE AT HOME, THE NO ESCAPE CONCEPT, AND THE CONSTANT FEAR, DID THAT COMBINATION OF CIRCUMSTANCES GIVE RISE TO A CONDITIONED RESPONSE IN WESLEY SHAFER?

A. INDEED IT DID.

Q. IS A CONCEPT OF CONDITIONED RESPONSE A REGULARLY ACCEPTED SCIENTIFIC PRINCIPLE?

A. YES, INDEED IT IS, ABSOLUTELY.

Q. CAN YOU TELL THE JURY WHAT A CONDITIONED RESPONSE IS.

A. LET ME EXPLAIN WHAT A CONDITIONED RESPONSE IS. AND THERE IS A REAL SIMPLE EXAMPLE THAT I USE WHEN I TEACH IT TO MY STUDENTS.

THERE WAS AN EXPERIMENT DONE EARLY IN THIS CENTURY IN WHICH THEY WOULD PUT RATS IN A MAZE, AND WHAT WOULD HAPPEN IS THE RAT WAS TAUGHT THAT - IT WOULD BE FOOD DEPRIVED, THEY HADN'T BEEN ABLE TO EAT FOR A DAY. [1728] AND THEY PUT HIM IN A MAZE AND AT THE END OF THE MAZE THERE IS FOOD. AND THE RAT VERY QUICKLY LEARNED TO LAND, ZIP RIGHT DOWN TO THE FOOD; LAND AND ZIP RIGHT DOWN TO THE FOOD. NOW, WHAT HAPPENED IS THAT SET OF MOTOR SKILLS BECOMES CONDITIONED, AUTOMATIC, REFLEXIVE. BUT WHAT WAS REALLY STARTLING TO THEM TO DEMONSTRATE THE DEGREE TO WHICH IT BECAME REFLEXIVE, IS THAT THEY TOOK THE MAZE, AND THEY SHORTENED IT BY JUST SIX INCHES. WHAT HAPPENED WAS THE RAT LANDED AND PLOWED INTO THE END OF THE MAZE EVERY TIME. THEY CALLED IT THEIR KERPLUNK EXPERIMENT BECAUSE OF THE SOUND THE RATS MADE WHEN THEY HIT INTO THE END OF THE MAZE.

IMAGINE, IF YOU WILL,THE ASTONISHMENT, THE SURPRISE, THE SHOCK OF THIS RAT WHEN HE SMACKED INTO THE END OF THAT MAZE. AND WHEN PEOPLE HAVE BEEN CONDITIONED TO REACT IN A CERTAIN WAY, THAT'S THE SAME KIND OF ASTONISHMENT THEY COMMUNICATE WHEN THEY HAVE DONE SOMETHING PAINFUL OR HARMFUL OR CONFUSING THAT HAS BEEN CONDITIONED INTO THEM.

Q. WHAT WOULD BE THE CONDITIONED RESPONSE TO WESLEY SHAFER?

A. IN WESLEY SHAFER THE CONDITIONED RESPONSE, THE ROOT CONDITIONED RESPONSE IS WHEN HE HOLDS A WEAPON IN HIS HAND AND HE POINTS IT AT ANOTHER HUMAN BEING IS TO PULL THE TRIGGER. IN THOSE GAMES HE IS NEVER, NEVER, NEVER REINFORCED FOR DOING NOTHING. YOU NEVER PUT A QUARTER [1729] INTO THE MACHINE AND HOLD THE WEAPON UP AND DON'T FIRE IT. YOU DO IN THE MILITARY. THE PROPER ANSWER IN THE MILITARY IN THE EARLY STAGES OF TRAINING, THE TARGET POPS UP AND YOU DON'T FIRE. IT'S A RIGHT RESPONSE. YOU DO IT IN LAW ENFORCEMENT. BUT YOU NEVER PUT A QUARTER IN THAT MACHINE, HOLD THE GUN UP AND DON'T FIRE IT. A CONDITIONED RESPONSE IS TO PULL THE TRIGGER.

Q. COULD SOMEONE WITH THAT CONDITIONED RESPONSE CARRY A WEAPON FOR THE PURPOSE OF COMMITTING AN ARMED ROBBERY AND NOT END UP SHOOTING IT?

A. IT WOULD BE EXTRAORDINARILY DIFFICULT FOR THEM TO NOT SHOOT IT.

Q. NOW, HAVE YOU COME ACROSS PEOPLE IN YOUR STUDY WHO DO NOT FIT THE PROFILE; IN OTHER WORDS, ARE THERE THOSE PEOPLE WHO KILL BEYOND THE BOUNDARIES OF YOUR STUDY?

A. SURE.

Q. WHO ARE THEY, AND HOW DOES THAT OCCUR?

A. WHEN YOU RUN INTO THE INDIVIDUALS WHO LIKE COMBAT, THEY ARE RARE. WE HAVE BEEN ABLE TO IDENTIFY THE FACT THAT THEY RUN ABOUT TWO PERCENT; THEY ARE ESSENTIALLY VIOLENT SOCIOPATHS. FROM A VERY YOUNG AGE THEY LIKE COMBAT, THEY LIKE CONFLICT; THEY ARE NOT DISTRESSED BY IT, THEY TAKE PLEASURE IN IT. THE WIDE VARIETY, THE VAST MAJORITY OF PEOPLE IN COMBAT, ALTHOUGH THEY TAKE PLEASURE IN SUCCESS, THEY TAKE PLEASURE IN VICTORY, THEY DO NOT TAKE [1730] PLEASURE IN THE ENEMY SUFFERING. I HAVE INTERVIEWED SOLDIERS, THEY ARE RARE. I HAVE INTERVIEWED VETERANS, THEY ARE VERY RARE. I HAVE INTERVIEWED CRIMINALS, AND, AGAIN, IT'S MORE COMMON IN THE CRIMINAL COMMUNITY WHO DO DERIVE PLEASURE IN THE SUFFERING OF OTHERS.

Q. DID YOU IN FACT FIND WESLEY SHAFER WAS WITHIN THE PARAMETERS OF YOUR STUDY OR OUTSIDE THE PARAMETERS OF YOUR STUDY?

A. HE IS IN THE PARAMETERS OF A HEALTHY INDIVIDUAL, AN AMAZINGLY HEALTHY INDIVIDUAL WHO HAS NOT LEARNED TO DERIVE ANY PLEASURE FROM HIS FELLOW HUMAN BEING'S SUFFERING. SO, HE IS NOT BY DEFINITION A SOCIOPATH WHO IS CONDITIONED.

Q. WHEN YOU INTERVIEWED WESLEY SHAFER, DID HE GIVE ANY STATEMENTS TO YOU THAT WERE CONSISTENT WITH THE THEORIES THAT YOU HAVE TOLD THE JURY TODAY?

A. WHAT HE DID WAS HE TALKED ABOUT, AND I SEE THIS SO OFTEN WITH VETERANS, HE TALKED ABOUT HOW IT SHOULDN'T HAVE HAPPENED, SHOCK, CONFUSION, DISMAY. WHEN YOU LOOK INTO THE EYES OF THESE KIND OF PEOPLE, AND YOU HEAR THEM TELL THE WAR STORIES, YOU ARE CONSTANTLY FILTERING OUT THE B.S., YOU'RE CONSTANTLY LOOKING TO CROSS CHECK THE VETERANS WITH A WIDE VARIETY OF DIFFERENT TOOLS. BUT THE ONE THING THAT PEOPLE WOULDN'T THINK TO COMMUNICATE, [1731] THEY WOULDN'T KNOW TO COMMUNICATE IS THAT SHOCK, THAT DISMAY, AND THAT CONFUSION. THE WORDS THAT HE COMMUNICATED WERE IT SHOULDN'T HAVE HAPPENED, IT WAS A MISTAKE. AND THOSE ARE THE WORDS OR SIMILAR WORDS, SIMILAR PHRASES, SIMILAR REACTIONS I'VE HEARD ON MANY OCCASIONS.

Q. DO YOU HAVE ANY ADDITIONAL INFORMATION TO PROVIDE TO THE JURY AS TO THE PHYSICAL EFFECTS THAT A CONDITIONED RESPONSE HAS?

A. YES. IN MY TIME IN THE MILITARY THERE ARE PEOPLE WHO ARE DEAD BECAUSE OF DECISIONS I HAVE MADE, AND ORDERS I HAVE GIVEN. WHEN YOU ARE IN A LIFE AND DEATH SITUATION, NOBODY CAN MAKE THAT DECISION FOR YOU. THE ONLY THING THAT YOU WILL EVER THANK ANYBODY FOR IS INFORMATION. THE ONLY THING WHEN YOU ARE IN A LIFE AND DEATH SITUATION THAT YOU WANT AND YOU NEED IS INFORMATION. I HOPE THAT I HAVE SOME INFORMATION, HAVE

BEEN ABLE TO GIVE AND MAY BE ABLE TO GIVE SOME INFORMATION FOR THOSE WHO HAVE TO MAKE LIFE AND DEATH DECISIONS.

Q. DO YOU HAVE INFORMATION ON THE PHYSICAL EFFECTS OF –

A. YES, I DO.

Q. WOULD YOU SHOW THAT TO THE JURY?

A. IF I MAY?

THE COURT: CERTAINLY.

(THE WITNESS WALKED IN FRONT OF THE JURY TO THE VIDEO [1732] MONITOR)

A. THIS IS SOME MATERIAL THAT HAS BEEN PUBLISHED IN A VARIETY OF DIFFERENT SOURCES, THE ACADEMIC PRESS ENCYCLOPEDIA OF VIOLENCE, PEACE AND CONFLICT MOST RECENTLY, AND IT'S BEING USED TO BRIEF SECRET SERVICE, F.B.I., LAW ENFORCEMENT COMMUNITIES AROUND THE WORLD. THIS IS JUST TO RECAP WHAT I SAID BEFORE, AND BASICALLY THE CONCEPT IS THIS. WHEN YOUR HEART RATE BEGINS TO GO UP, CERTAIN THINGS BEGIN TO HAPPEN. ONCE THE HEART RATE GETS ABOVE 180 BEATS PER MINUTE, ABOVE 175 BEATS PER MINUTE, AND THE THING TO REALIZE IS HOW EXTRAORDINARILY DIFFICULT IT IS TO BE IN A CONFLICT SITUATION, TO HOLD THE GUN UP TO ANOTHER PERSON AND NOT HAVE YOUR HEART BEAT GO UP; YOU CAN JUST IMAGINE WHAT IS GOING ON IN THAT SITUATION.

I WOULD SAY THAT IT IS ALMOST HUMANLY IMPOSSIBLE FOR ANY HUMAN BEING TO BE IN A SITUATION LIKE A ROBBERY WHERE YOU'RE HOLDING A WEAPON WITHOUT HAVING THAT HEART RATE GO WELL OVER 175 BEATS A MINUTE. IN ESSENCE WHAT HAPPENS IN OVER 175 BEATS PER MINUTE IS THAT THE FOREBRAIN CLOSES DOWN.

NOW LET ME EXPLAIN WHAT THAT MEANS. THE HUMAN MIND IS REALLY TWO BRAINS LAID ON TOP OF ONE ANOTHER. THE FOREBRAIN IS THE HUMAN BRAIN, THE BRAIN THAT WE USE ALL THE TIME. BUT IF ANYBODY HAS EVER TRIED TO HAVE AN [1733] ARGUMENT OR A DISCUSSION WITH SOMEBODY WHO IS FRIGHTENED OR ANGRY, YOU KNOW THAT YOU CAN'T DO THAT, RIGHT? YOU CAN'T HAVE A DISCUSSION WITH AN ANGRY PERSON OR A FRIGHTENED PERSON BECAUSE THEY ARE NOT LOGICAL. SCIENTIFICALLY, PHYSIOLOGICALLY WHAT HAS HAPPENED IS THE FOREBRAIN HAS CLOSED DOWN AND THE MIDBRAIN HAS TAKEN OVER.

ONCE THE MIDBRAIN HAS TAKEN OVER, THEY ARE NO SMARTER THAN YOUR DOG; THEY ARE NO MORE RATIONAL THAN YOUR DOG AT THAT POINT IN TIME. NOW THROUGHOUT HUMAN HISTORY WE HAVE BEEN ABLE TO COUNT ON THE FACT THAT ANGRY AND FRIGHTENED HUMAN BEINGS WON'T KILL ONE ANOTHER. REMEMBER WHAT I TOLD YOU, EVERY SPECIES HAS A RESISTANCE AGAINST KILLING THEIR OWN KIND. BUT ONCE YOUR HEART RATE IS OVER 175 BEATS PER MINUTE, IF YOU HAVE BEEN CONDITIONED TO RESPOND TO A FIRE DRILL

BY WALKING OUT THE DOOR, THAT'S WHAT YOU WILL DO. IF YOU HAVE BEEN CONDITIONED IN A FLIGHT SIMULATOR TO RESPOND TO A WARNING LIGHT WITH A CERTAIN RESPONSE, THAT'S WHAT YOU WILL DO. IF YOU HAVE BEEN CONDITIONED THOUSANDS OF TIMES TO PULL THE TRIGGER WHEN YOU HAVE A GUN POINTED AT ANOTHER HUMAN BEING, THAT'S WHAT YOU WILL DO. THE NET EFFECT OF THIS PROCESS –

Q. COLONEL GROSSMAN?

A. YES?

[1734] Q. WOULD THE COMMISSION OF A CRIME CAUSE SOMEONE'S HEART RATE TO GO UP TO THE EXTENT THAT YOU ARE DEMONSTRATING NOW?

A. WITHOUT A DOUBT. IT WOULD BE EXTRAORDINARILY DIFFICULT FOR IT NOT TO.

MR. POPE: YOUR HONOR, I OBJECT. I DON'T THINK HE HAS BEEN QUALIFIED MEDICALLY. THERE IS NO INDICATION OF THAT, AND I OBJECT TO THAT QUESTION AND ANSWER.

THE COURT: I OVERRULE THE OBJECTION.

Q. GO AHEAD.

A. ALL RIGHT, HERE'S WHAT WE'VE GOT. THIS PHENOMENON THAT WE ARE TALKING ABOUT THAT I'VE ALREADY OUTLINED HERE, AS THE CONDITION THAT HAS OCCURRED, HAS CREATED WHAT HAS BEEN REFERRED TO AS A VIRUS OF VIOLENCE, AN EXPLOSION OF VIOLENT CRIME IN AMERICA.

WHAT I WANT TO DO IS TO SHOW YOU THE BOTTOM OF THIS CHART. THIS CHART STARTS IN 1957 AND IT GOES TO 1992. NOW, DURING THAT TIME FRAME –

Q. ON THAT CHART, IF YOU WOULD SHOW WHERE WESLEY'S AGE WOULD FALL.

A. THIS GAP RIGHT IN HERE REPRESENTS, IF YOU WILL, THE TIME FRAME OF WESLEY SHAFER'S LIFE, SAY FROM ABOUT '89 ON IS REALLY THE KEY TIME FRAME. WE ARE TALKING ABOUT SOME REALLY INFLUENTIAL PROCESSES THAT ARE GOING ON THERE. PROBABLY ABOUT '85 ON WHEN HE STARTS TURNING ABOUT THREE [1735] YEARS OLD THESE THINGS OCCUR.

NOW, AS WE LOOK AT THE MURDER RATE, THE MURDER RATE HAS DOUBLED PER CAPITA, THAT IS 300,000 NUMBER OF MURDERS HAVE OCCURRED SINCE 1957. THE FIRST THING THAT WE LEARNED BASED ON THE RESEARCH DONE BY JOHNNY JULIO AND UCLA, IS THAT YOU HAVE TO IGNORE THE MURDER RATE TO UNDERSTAND THE PROBLEM AGAINST ANY BODY OF TIME BECAUSE MEDICAL TECHNOLOGY IS SAVING EVER MORE LIVES. A WOUND THAT NINE OUT OF TEN TIMES WOULD HAVE KILLED YOU IN WORLD WAR II, LATER IN VIETNAM YOU WOULD HAVE SURVIVED THAT SAME WOUND NINE OUT OF TEN TIMES. WE ALL UNDERSTAND THE LEAPS AND BOUNDS OF MEDICAL TECHNOLOGY. WHAT WE'VE GOT TO UNDERSTAND IS IF MEDICAL TECHNOLOGY WAS HELD STABLE AT

THE 1940'S LEVEL, THE MURDER RATE IN AMERICA TODAY WOULD EASILY BE TEN TIMES WHAT IT IS.

Q. AND THAT STATEMENT IS BASED ON THE RESEARCH THAT YOU HAVE DONE IN YOUR STUDY OF VIOLENCE IN AMERICA?

A. YES.

Q. NOW WHAT THAT MEANS IS THIS. IF YOU WANT TO TAKE A LOOK AT THE CRIME IN AMERICA, YOU'VE GOT TO TAKE A LOOK AT THE RATE AT WHICH PEOPLE ARE TRYING TO KILL ONE ANOTHER. THE AGGRAVATED ASSAULT RATE HAS GONE UP FROM AROUND 60 PER 100,000 IN 1956 TO OVER 400 PER 100,000 TODAY.

Q. AGAIN, COLONEL GROSSMAN, IF YOU COULD SHOW THEM ON THAT CHART WHERE WESLEY'S RESPONSE WOULD BEGIN.

[1736] A. THIS LITTLE AREA THAT REACHES FROM HERE TO HERE REPRESENTS THE TIME FRAME OF WESLEY SHAFER'S LIFETIME.

Q. AS A PSYCHOLOGIST IN THE AREA OF YOUR EXPERTISE, TO WHAT DO YOU CONTRIBUTE THAT GROWTH DURING THAT TIME FRAME?

A. IT IS NOT ONLY MY CONCLUSION; IT IS THE CONCLUSION OF THE AMERICAN MEDICAL ASSOCIATION, THE AMERICAN ACADEMY OF PEDIATRICS, THE AMERICAN PSYCHIATRIC ASSOCIATION, THEIR EQUIVALENT IN A DOZEN OTHER NATIONS THAT THE CAUSE OF THIS EXPLOSION OF VIOLENCE IS VIOLENCE IN THE MEDIA AND VIOLENCE IN THE INTERACTIVE VIDEO GAMES

AND THE REASON FOR THAT, AMONG OTHER THINGS, THE RESEARCH THAT I HAVE BEEN ABLE TO PROVIDE FROM INTERPOL – NOW, THIS ISN'T THE FIRST TIME THAT ANYBODY HAS PUBLISHED THIS INFORMATION THAT'S IN MY BOOK, IT'S BEEN IN OTHER PLACES SUBSEQUENTLY FROM INTERPOL. IN ESSENCE WHAT HAPPENS HERE BETWEEN '77 AND '93 IS THE INTERNATIONAL SERIOUS ASSAULT RATE AND THE INTERNATIONAL MURDER RATE HAVE INCREASED WORLDWIDE, AND EVERY MAJOR INDUSTRIALIZED NATION IN THE WORLD HAS DONE THE SAME THING; THERE HAS BEEN THIS INCREASE IN VIOLENCE IN NORWAY, SWEDEN, GREECE, HUNGARY, AUSTRALIA, FRANCE, SCOTLAND, BELGIUM, DENMARK, ENGLAND, WALES, THE U.S., INDIA, HUNGARY, AROUND THE WORLD EVERY NATION THAT EMBRACES VIOLENCE FOR THEIR CHILDREN AS ENTERTAINMENT IS PAYING THE SAME PRICE. AND THERE HAS BEEN A CONCLUSIVE COMPREHENSIVE [1737] WORLDWIDE CONCLUSION AS TO WHAT IS GOING ON, AND WHY THIS IS OCCURRING. WE'RE LEARNING TO KILL IN THE INTERACTIVE VIDEO GAMES, AND WE'RE LEARNING TO LIKE IT IN THE MOVIES.

Q. COLONEL GROSSMAN, AS YOUR STUDY INDICATES THAT PEOPLE ARE BEGINNING TO NOTICE THE EFFECT OF VIOLENCE IN THE MEDIA, IS THAT ANALOGOUS TO A PREVIOUS RECOGNITION OF THE AFFECT OF SEX IN THE MOVIES?

A. SEX IN THE MOVIES IS SOMETHING THAT WE HAVE HAD A GREAT DEAL OF DIFFICULTY PINNING DOWN. THE LINK BETWEEN SEX AND

PREGNANCY IS PROBABLY THERE, BUT, YOU KNOW, YOU CAN'T PUT TOGETHER THE KIND OF STUDIES THAT WOULD DEMONSTRATE IT AS WE HAVE WITH VIOLENCE IN THE MEDIA. LET ME GIVE YOU A –

Q. IF SOMEONE SAYS, YOU KNOW, MAMA, I WANT TO GO WATCH A MOVIE AND IT'S RATED R BUT THERE'S NO SEX IN IT, IS THAT THE TYPE OF CONCERN YOU ARE EXPRESSING HERE?

A. SURE, THAT IS THE KIND OF THING – THE AMERICAN MEDICAL ASSOCIATION HAS MADE THEIR NUMBER ONE AGENDA ITEM VIOLENCE IN AMERICA, BECAUSE THE DOCTORS ARE THE ONES WHO HAVE TO DEAL WITH IT, AND THEY HAVE MADE THEIR NUMBER ONE PLAN OF THAT AGENDA EDUCATING PARENTS ABOUT THE LINK BETWEEN VIOLENCE IN THE MEDIA AND VIOLENCE IN SOCIETY.

Q. IF YOU WOULD REFER BACK TO YOUR INTERVIEWS AND RESEARCH [1738] IN THIS CASE TODAY, WHAT DID YOU LEARN FROM THE INTERVIEWS THAT YOU HAD WITH WESLEY SHAFER AND HIS FAMILY?

A. FROM WESLEY, HIS MOTHER, HIS DAD, HIS SISTER WHAT I FOUND WAS A LIFE LONG PATTERN OF ABUSE BY THE FATHER, MENTAL AND PHYSICAL. HE WAS SET ON FIRE; HIS DOGS WERE TORTURED AND KILLED; HE WAS KICKED IN THE CHEST; RANDOMLY BEAT IN THE FACE UNTIL HE BLED FROM THE NOSE AND THE MOUTH; COLD, CALCULATED, BRUTAL AND INESCAPABLE BRUTALITY.

Q. WHAT DID YOU LEARN IN YOUR CONVERSATION WITH DR. GOLDSMITH?

A. I LEARNED THAT HE WAS FILLED WITH ANGER.

Q. DR. GOLDSMITH?

A. THANK YOU VERY MUCH. NO. THAT WESLEY SMITH WAS FILLED WITH ANGER. THE STATEMENTS THAT DR. GOLDSMITH SAID –

THE COURT: YOU MEAN WESLEY SHAFER?

A. I'M SORRY; I'M SORRY, THANK YOU VERY MUCH. THAT WESLEY SHAFER WAS FILLED WITH ANGER, AND THAT THAT ANGER WAS DRIVING AND DIRECTING MOST OF HIS ACTIONS.

Q. NOW, COLONEL GROSSMAN, YOU DID NOT RECEIVE A REPORT FROM DR. GOLDSMITH, BUT YOU DISCUSSED HIS WORK WITH HIM; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. NOW, WHAT DID YOU LEARN FROM THE STUDY OF THE PROBATION [1739] RECORDS OF WESLEY SHAFER?

A. IN HIS PROBATION PROCESS, AND AGAIN PROBATION IS A LEARNING, WE ARE TRYING TO REINFORCE BEHAVIORS, WE ARE TRYING TO REINFORCE SUCCESSFUL BEHAVIORS AND PUNISH BEHAVIORS THAT ARE UNDESIRABLE. IN HIS PROBATION RECORD WHAT HAPPENED IS THERE WERE 11 TIMES WHEN HE VIOLATED PROBATION, THEY

WEREN'T MAJOR VIOLATIONS, YET THEY WERE ALL INDICATIONS OF THE FACT THAT THIS INDIVIDUAL WAS GOING IN THE WRONG DIRECTION. BY FAILING TO PUNISH THOSE VIOLATIONS, THE SOCIETY THAT PROCESSED THE INDIVIDUAL THAT WERE ENTRUSTED TO THEM, FAILED TO COMMUNICATE THE PROPER MESSAGE. HE STARTED OFF PRETTY GOOD, THEN HE WENT DOWN HILL MORE AND MORE AND MORE. INCREASING FAILURE TO PROVIDE PUNISHMENT AND TO HOLD HIM ACCOUNTABLE FOR HIS ACTIONS, SO, ANY KIND OF LOVING, GUIDING OF REASONABLE PARAMETERS WAS LOST IN THAT OPPORTUNITY.

Q. DID THE STUDY OF THOSE REPORTS INDICATE HOW MANY TIMES HE ACTUALLY VIOLATED PROBATION?

A. I WAS ABLE TO COUNT 11 TIMES.

Q. DID ANY OF THOSE RESULT IN WARRANTS, ARRESTS OR RAMIFICATIONS?

A. NO.

Q. WHEN IS THE LAST TIME THAT PROBATION, BASED UPON THE RECORDS THAT YOU REVIEWED, COULD HAVE ACTUALLY TAKEN HIM [1740] OFF THE STREETS?

A. I BELIEVE IT WAS JUST IN THE LAST MONTH.

Q. WHAT DID YOU LEARN FROM THE DISCOVERY MATERIAL THAT WAS PROVIDED TO YOU IN THIS CASE?

A. THE INFORMATION THAT WAS AVAILABLE FOCUSED A LOT ON WHERE HE WENT, WHEN HE WENT, HOW HE WENT, BUT NEVER ON WHY. I WAS NOT ABLE TO FIND – MY GOAL IS TO GET INSIDE SOMEBODY'S HEAD, AND I WAS NEVER ABLE TO FIND ANY INDICATION OF AN INTENT OR A PLAN TO KILL AT ANY POINT IN TIME.

Q. THE IDEA OF A PLAN, IS THERE SUCH A THING AS CLINICAL MALICE?

A. YES, INDEED.

Q. WHAT IS CLINICAL MALICE?

A. THE WAY I DEFINE IT IS AN INDIVIDUAL IN COMBAT WHO GOES OUT INTENDING, AND LOOKING FORWARD TO KILLING.

Q. AND DID YOU FIND ANYTHING IN YOUR REVIEW OF THE RECORDS IN THIS CASE THAT INDICATED THAT WAS THE INTENTION OF WESLEY SHAFER?

A. NO, NO.

Q. IS IT YOUR OPINION THEN THAT WESLEY SHAFER'S SHOOTING OF THE GUN AND KILLING OF MR. BROOME WAS A RESULT OF CONDITIONED RESPONSE?

A. IT IS THE SAME THING THAT WE'VE SEEN, IT COULD BE ANY ONE OF UNTOLD THOUSANDS OF KIDS ACROSS AMERICA HOLDING [1741] THAT GUN AT THAT TIME.

Q. WHAT DID YOU LEARN FROM THE VIDEO TAPE IN THIS CASE?

A. IT LOOKED TO ME LIKE WHAT WE WERE LOOKING AT WAS A CONDITIONED RESPONSE ON THE ONE HAND, AND THE BUILT IN HARDWARE PROGRAM THAT WAS FOLLOWING THE ACTIONS OF THAT MOVIE. AGAIN, A CONDITIONED RESPONSE, YOU NEVER HOLD THAT WEAPON UP AND NOT SHOOT. WHEN YOU ARE PLAYING THOSE GAMES, THEY WILL DO SOMETHING, SOMETHING WILL HAPPEN THAT WOULD CAUSE YOU TO SHOOT. SOMETHING HAPPENED AND HE SHOT.

Q. DID YOU SEE ANYTHING ON THE VIDEO TAPE THAT WOULD INDICATE ANYTHING THAT THE DECEASED DID TO WESLEY SHAFER AT ALL?

A. NO, NO. IT'S SO HARD TO TELL, AND I LOOKED VERY HARD.

Q. IN YOUR REVIEW OF THE DISCOVERY OF THE CASE DID YOU FIND WHERE WESLEY SHAFER HAD MADE ANY STATEMENT THAT SAID WHAT HIS VIEW WAS OF WHAT OCCURRED?

A. YES.

Q. WHAT WAS THAT?

A. IT APPEARED THAT – AGAIN, WHEN YOU FOCUS ON THE HEART OF A PERSON WHEN A PERSON KILLS ANOTHER PERSON, THE HEART RATE IS THROUGH THE ROOF AND MEMORY BECOMES VERY BAD; TIME TENDS TO COMPRESS.

Q. SOMETHING THAT IS SEVERAL SECONDS TO SOMEBODY ELSE MAY BE INSTANTANEOUS TO SOMEBODY ELSE; IS THAT WHAT YOU [1742] MEAN?

A. YES.

Q. AND HOW DOES THAT RELATE TO THIS CASE ON THE VIDEO TAPE?

A. IN THIS CASE HE RELATES IT AS HAVING BEEN, THE SECOND SHOT AUTOMATIC. AND THE REALITY OF WHAT HE DID, AND WE SEE THIS IN LAW ENFORCEMENT OFFICERS A LOT, WHERE THEY SHOOT UNTIL THE TARGET STOPS MOVING. IN THIS CASE HE APPEARED TO HAVE MOVED, AND FIRED A SECOND SHOT. IT'S PART OF WHAT THE PROGRAM WAS IN THE MOVIE TO ONE DEGREE. TO ANOTHER DEGREE IT IS VERY CONSISTENT WITH INDIVIDUALS IN THAT CIRCUMSTANCE. HE HAS NO REAL CAUSE TO LIE ABOUT THAT. IT APPEARS THAT IT HAD COMPRESSED IT IN HIS MIND.

Q. WHEN DID HE SAY HE FIRED THE SECOND –

A. HE SAID IT HAPPENED IMMEDIATELY, AS HE WAS FAILING ALMOST –

Q. WHEN MR. BROOME WAS –

THE COURT: LET ONE FINISH BEFORE THE OTHER STARTS. THE COURT REPORTER, I KNOW, IS HAVING TROUBLE TAKING IT DOWN.

Q. THANK YOU, YOUR HONOR. WHAT DID YOU REVIEW IN REGARD AS TO THE STATEMENT OF WESLEY SHAFER AS TO WHEN HE BELIEVED THE SECOND SHOT WAS FIRED?

A. HE BELIEVED APPARENTLY THE SECOND SHOT WAS HAPPENING AS MR. BROOME WAS FALLING.

Q. AND THE VIDEO TAPE DOES NOT SHOW THAT, OBVIOUSLY?

A. THAT'S CORRECT.

[1743] Q. WHAT DID YOU LEARN FROM ANY REVIEW OF ANY CRIMINAL RECORD OF WESLEY SHAFER?

A. ONE LITTLE SIDE ASIDE IS HIS RAP SHEET, ABOUT THE FACT THAT ONE OF HIS EARLIEST INTIMACIES WAS ESSENTIALLY WITH A CHILD WHICH WAS ALL CONSENSUAL, DEFINITELY FROM THE REPORT OF THE INDIVIDUALS INVOLVED, THE GIRLS INVOLVED. HIS EARLIEST INTIMACY BECAME A CAUSE FOR SHAME. MY EARLIEST INTIMACY WAS MY WIFE, A GIRL WHO WAS TO BECOME MY WIFE WHO WAS OF AN AGE THAT THE STATE OF NEBRASKA COULD HAVE PUT ME IN JAIL. I THINK ABOUT THAT SOMETIMES.

MR. POPE: YOUR HONOR, I OBJECT.

THE COURT: I SUSTAIN THE OBJECTION. LET'S DON'T GO INTO PERSONAL MATTERS.

A. I'M SORRY.

Q. DID YOU REVIEW ANY OF THE STATEMENTS FROM THE WITNESSES AT THE HOT SPOT THAT NIGHT?

A. THE WITNESSES DURING THE PERIOD PRIOR, YES.

Q. AND WHAT DID YOU LEARN FROM THEIR STATEMENTS?

A. IT WOULD APPEAR THAT, NUMBER ONE, THERE WERE A COUPLE OF YOUNG BOYS THAT WANTED ATTENTION. THEY WERE FIRING SHOTS. THEY ASKED TWO GIRLS TO COME WITH THEM WHICH IS VERY INTERESTING. NOW, YOU DON'T ASK SOMEONE TO COME WITH YOU TO A ROBBERY, TO A MURDER. THE SPONTANEITY OF THE WHOLE THING COMES THROUGH. THEY ARE LOOKING FOR [1744] ATTENTION.

THE INTERESTING THING IS THAT WHEN THEY FIRED THE SHOTS THAT MEMBERS OF THE COMMUNITY DIDN'T REPORT IT WHICH IS ANOTHER INSIGHT INTO THE WAY OF WHICH WE'VE GOT A WHOLE GENERATION WHO HAVE BECOME JADED.

Q. DID IT SURPRISE YOU AT ALL OF THE REPORTS OF THE ATTENTION GETTING REACTIONS?

A. NO, THEY LEFT.

Q. DID IT SURPRISE YOU AT ALL THAT THEY DID NOT CALL LAW ENFORCEMENT?

A. NO.

Q. WHY NOT?

A. AGAIN, THAT'S WHAT THE CHILDREN HAVE LEARNED. THAT'S WHAT WE'VE TAUGHT THEM; WE HAVE TAUGHT THEM TO LAUGH AT THESE THINGS. AND THE IDEA OF CALLING THE POLICE IS ALMOST ALIEN FROM THEIR MINDS, AT LEAST TO A DEGREE.

Q. YOU TOLD THE JURY ABOUT THE MOVIES AND THE RESULTING CONDITIONED RESPONSE. IF SOMEONE WERE TO WATCH VIOLENT MOVIES WITH

A LOVING FATHER WHO IS THEIR BEST FRIEND, WHAT IS THE DIFFERENCE BETWEEN THAT AND THE TYPE OF ENVIRONMENT THAT WESLEY SHAFER WATCHED THE MOVIES IN?

A. IT IS ALL THE DIFFERENCE IN THE WORLD BETWEEN WATCHING A MOVIE ONCE OR TWICE WITH SOMEBODY WHO IS PROVIDING A STRUCTURE, AND WATCHING IT 50 TIMES ON YOUR OWN. THE DIFFERENCE IS PROFOUND.

[1745] Q. HAVE YOU FORMED AN OPINION TO A REASONABLE DEGREE OF SCIENTIFIC CERTAINTY AND IN YOUR AREA OF EXPERTISE ON THIS CASE?

A. INDEED.

Q. AND WHAT IS THAT?

A. I BELIEVE THAT WHAT WE ARE LOOKING AT, AND WHAT WE ARE SEEING OVER AND OVER AGAIN IS THIS IS A TYPICAL SPECIFIC CASE THAT STICKS OUT BECAUSE IT IS SO COMMON. WE ARE SEEING A CONDITIONED RESPONSE CONDITIONED BY VIOLENCE, INESCAPABLE ALL CONSUMING VIOLENCE AT HOME, IN THE MOVIES, IN THE VIDEO GAMES AND IN THE COMMUNITY AS IS SHOWN BY THE CRUELTY INFLICTED ON HIS PETS, NOT TEMPERED BY ANY STRUCTURE OR BY ANY INSTITUTION OR BY HIS FAMILY. AND AS A RESULT, HE HAD NO IDEA OF WHY HE SHOT, AND REALLY AND TRULY I BELIEVE HE HAD NO PLAN TO SHOOT.

Q. THANK YOU, COLONEL GROSSMAN.

. . .

[1815] **MR. BRACKETT**: YES, SIR. THE NEXT ISSUE I WOULD RAISE, YOUR HONOR, IS I DO NOT BELIEVE THAT THE DEFENDANT IS ENTITLED TO A STATUTORY MITIGATING CHARGE OF NO SIGNIFICANT HISTORY OF A VIOLENT CRIME. YOUR HONOR, THIS DEFENDANT STANDS CONVICTED OF CRIMINAL SEXUAL CONDUCT IN THE SECOND DEGREE WITH A MINOR WHICH IS LISTED IN THE CODE AS A VIOLENT CRIME. IN ADDITION, IT IS ALSO LISTED AS A CRIME OF VIOLENCE. BURGLARY, HE WAS ALSO CONVICTED OF THAT WHICH IS LISTED AS A CRIME OF VIOLENCE.

I UNDERSTAND THAT YOUR HONOR IS CONCERNED WITH THE MEANING AND THE SHADING OF THE WORD SIGNIFICANT, AND I UNDERSTAND THAT IS A RELATIVE TERM. YOUR HONOR, I WOULD SUBMIT THAT IF THIS DEFENDANT WAS 50 YEARS OLD AND THIS WAS ALL THAT WAS ON HIS RECORD, IT MIGHT NOT BE SIGNIFICANT, BUT THE FACT OF THE MATTER IS THAT THIS DEFENDANT HAS ONLY BEEN ELIGIBLE TO RACK UP AN ADULT CRIMINAL RECORD FOR THE LAST TWO YEARS. HE HAS BEEN IN JAIL FOR NINE MONTHS OF THOSE TWO YEARS. SO, ESSENTIALLY, IN A LITTLE OVER A YEAR THIS DEFENDANT HAS GOTTEN A CONVICTION FOR TWO OF THE MOST SERIOUS [1816] CRIMES THAT WE HAVE. AS A MATTER OF FACT, I BELIEVE CSC SECOND WITH A MINOR IS A MOST SERIOUS OFFENSE.

THE COURT: WELL, WHAT HAPPENS TO DUE PROCESS IF YOU ARGUE THAT A 50 YEAR OLD MAN WOULD BE ENTITLED TO IT, BUT A 19 YEAR OLD WOULD NOT?

MR. BRACKETT: WELL, SIGNIFICANT IS A RELATIVE TERM. AS I SAID, YOUR HONOR, WHAT IS SIGNIFICANT IN A SPAN OF 25 YEARS OF BEING AN ADULT IS DIFFERENT FROM WHAT IS SIGNIFICANT IN BEING AN ADULT FOR TWO YEARS.

THE COURT: WHAT IF HE WERE 20?

MR. BRACKETT: I WOULD SAY THAT HE IS - I SUBMIT THAT -

THE COURT: ANSWER MY QUESTION. WHAT IF HE WERE 20?

MR. BRACKETT: HE WOULD NOT BE ENTITLED TO IT. I DON'T BELIEVE HE WOULD BE ENTITLED TO IT IF HE IS 50.

THE COURT: I AM GOING TO CHARGE MITIGATING CIRCUMSTANCE NUMBER 1. ALL RIGHT, WHAT ELSE?

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[1817] **MR. BRACKETT:** YOUR HONOR, FINALLY - WELL, THE LAST TWO ISSUES. THE FIRST ONE I WOULD ARGUE THAT WE HAVE NOT MADE FUTURE DANGEROUSNESS AN ISSUE IN THIS CASE UNDER STATE VERSUS SUTHERLAND. I HAVE A COPY OF THAT CASE HERE, AND STATE VERSUS TUCKER. STATE VERSUS SUTHERLAND, 447 SOUTHEASTERN REPORTER 2D 862; AND STATE VERSUS

TUCKER, 462 SOUTHEASTERN 2D 263. BOTH OF THESE CASES HOLD THAT UNLESS THE STATE ARGUES FUTURE DANGEROUSNESS, THAT THE DEFENDANT IS NOT ENTITLED TO A CHARGE ON PAROLE INELIGIBILITY, CITING [1818] SOUTH CAROLINA VERSUS SIMMONS, A SUPREME COURT CASE, WHICH HELD THE DEFENDANT IS ENTITLED WHEN THE STATE RAISES THE ISSUE OF FUTURE DANGEROUSNESS, WE CANNOT CONCEAL THE LAW FROM THE JURY THAT HE WOULD NOT BE ELIGIBLE FOR PAROLE. HOWEVER, THE STATE HAS NOT ARGUED AT ANY POINT IN TIME THAT HE WOULD BE A DANGER TO ANYBODY IN THE FUTURE, NOR WILL WE ARGUE IN OUR CLOSING ARGUMENT THAT HE WILL BE A DANGER TO ANYBODY IN THE FUTURE. AND HE IS NOT ENTITLED TO A CHARGE THAT HE IS NOT ELIGIBLE FOR PAROLE. WE WOULD ASK THAT THE JUDGE NOT CHARGE THAT; AND WE WOULD MAKE A MOTION IN LIMINE TO PREVENT THE DEFENSE FROM ARGUING IN THEIR CLOSING ARGUMENT ANYTHING TO THE EFFECT THAT HE WILL NEVER GET OUT OF PRISON OR ANYTHING OF THIS ORDER.

I HAVE THÓSE CASES IF YOUR HONOR WOULD LIKE TO SEE THEM.

THE COURT: ALL RIGHT. WHAT SAYS THE DEFENSE?

MR. BANKS: YOUR HONOR, IT'S INCREDIBLE TO ME THAT THE STATE CONTINUES TO WISH TO HAVE ITS CAKE, AND EAT IT, TOO. THE ISSUE OF ARGUING FUTURE DANGEROUSNESS IS NOT THE ARGUMENT BECAUSE ARGUMENT OF COUNSEL IS

NOT EVIDENCE. THE STATE CANNOT INTRODUCE EVIDENCE OF FUTURE DANGEROUSNESS, AND THEN SAY WE ARE NOT GOING TO ARGUE IT AND, THEREFORE, WE'RE NOT GOING TO GET A CHARGE ON THE LAW.

WE ARE EITHER GOING TO TELL THE JURY WHAT THE LAW IS OR WE'RE NOT. TORRENCE, TUCKER, SIMMONS AND ALL ARE PRE-[1819] CHANGES IN THE STATUTE. THIS STATUTE NOW ALLOWS LIFE WITHOUT PAROLE AS A CHARGE IF THERE IS EVIDENCE OF FUTURE DANGEROUSNESS.

THEY HAVE INTRODUCED POST ARREST ASSAULT, POST ARREST VIOLATIONS OF THE RULES OF THE JAIL; THERE IS NO REASON TO PUT THOSE FACTS IN EXCEPT FOR POST ARREST ACTIONS, NO REASON AT ALL, AND THAT EVIDENCE CARRIES OVER TO THE PENALTY PHASE AND IS PART OF THE PENALTY PHASE.

IF YOU PUT A JAILER ON TO SAY THAT HE IS CHARGED WITH ASSAULT AND BATTERY ON ME, THAT IS FUTURE DANGEROUSNESS.

MR. BRACKETT: YOUR HONOR, HE WAS CHARGED WITH SIMPLE ASSAULT, NOT ASSAULT AND BATTERY. AND, SECOND, WE PUT THAT IN FOR TWO REASONS, TO SHOW HIS CHARACTER AND TO SHOW HIS ADAPTABILITY TO PRISON, NOT FUTURE DANGEROUSNESS. NOBODY HAS ARGUED FUTURE DANGEROUSNESS OR SAID THAT HE MIGHT DO THIS AGAIN IN THE FUTURE, AND THE STATE DOESN'T INTEND TO IN ITS CLOSING ARGUMENT.

MR. BANKS: I DON'T SEE ANYWHERE IN THE STATUTE THAT IT SAYS ANYTHING ABOUT FUTURE DANGEROUSNESS. THOSE ARE CASE LAWS THAT PRE-DATES THE CHANGE IN THE STATUTE. THEY CANNOT ARGUE THAT THE CASE LAW SAYS YOU HAVE TO IMPUTE A DANGEROUSNESS TO GET IT WHEN THE STATUTE IS SILENT ON THAT ISSUE.

SO, OUR FIRST POSITION IS THAT THE STATUTE DOESN'T ADDRESS IT, AND THE STATUTE MUST BE CHARGED BECAUSE THE JURY [1820] MUST KNOW WHAT THE LAW IS.

OUR SECOND POSITION IS THAT THEY CANNOT USE THIS EVIDENCE FOR ONE PURPOSE, AND THEN TURN AROUND AND SAY THAT IT IS NOT FOR ANOTHER ONE. THE JURY IS THE ONLY ONE THAT CAN DETERMINE THE EVIDENCE AND HOW IT EFFECTS THEIR DECISION MAKING. WHEN THEY PUT SOMEBODY UP FOR POST ARREST ON ASSAULT, AND WE DON'T HAVE DEGREES OF FUTURE DANGEROUSNESS, YOU'RE EITHER DANGEROUS OR NOT. SIMPLE ASSAULT, ASSAULT, WHATEVER; THERE IS NO CASE LAW THAT DISTINGUISHES BETWEEN THOSE. WHEN THEY PUT THAT IN, THEY PUT IN FUTURE DANGEROUSNESS.

MR. BRACKETT: YOUR HONOR, TWO MORE POINTS ON THAT BRIEFLY. THE STATUTE USED TO SAY 20 YEARS ELIGIBILITY AND 30 YEARS ELIGIBILITY FOR PAROLE AND THE JURY WASN'T ALLOWED TO HEAR THAT.

THE SECOND POINT, YOUR HONOR, AND I'M QUOTING DIRECTLY FROM STATE VERSUS SUTHERLAND, "HERE THE SOLICITOR SPECIFICALLY AGREED NOT TO ARGUE SUTHERLAND'S FUTURE DANGEROUSNESS; THEREFORE, SUTHERLAND'S FUTURE DANGEROUSNESS WAS NOT AT ISSUE".

I SUBMIT THAT THE RULING OF THE COURT IS CLEAR IN THIS CASE. WE ARE NOT GOING TO ARGUE IT; THEREFORE, IT IS NOT IN ISSUE.

THE COURT: I FIND THAT THE MATTER OF PAROLE INELIGIBILITY WILL NOT BE CHARGED. I FIND THAT FUTURE [1821] DANGEROUSNESS, IF IT'S NOT ARGUED, IF IT'S ARGUED, IT MAY BECOME DIFFERENT.

MR. BRACKETT: YES, SIR. AND IF WE SPECIFICALLY ARGUE IT AT SOME POINT IN THE FUTURE –

THE COURT: I FIND THAT THAT IS NOT AN ISSUE AT THIS POINT.

MR. BANKS: I OBJECT TO THAT UNDER THE STATE AND FEDERAL CONSTITUTION, PARTICULARLY DUE PROCESS UNDER THE FOURTH AMENDMENT.

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[1838] **MR. BANKS:** OUR SECOND REQUEST, YOUR HONOR, IS THIS IS A MOTION IN LIMINE IN THAT CLOSING ARGUMENTS ARE – COUNSEL IS ALLOWED TO ARGUE THE FACTS AND ARGUE HOW THOSE FACTS FIT IN THE LAW, AND IT'S PRETTY MUCH PRECEDENT IN THIS STATE THAT COUNSEL

SAYS THE JUDGE WILL TELL YOU THE LAW, AND TO TAKE THE LAW AS THE JUDGE CHARGES IT AND SO FORTH. UNDER 16-320 WHICH THE COURT PLANS TO PARAPHRASE, WE MAKE A MOTION IN LIMINE THAT COUNSEL IN CLOSING CAN READ 16-320, AND I DON'T SEE ANYTHING IN OUR LAW THAT KEEPS US FROM DOING IT.

THE COURT: I'LL BE GLAD TO HEAR FROM THE STATE ON THAT.

MR. POPE: YOUR HONOR, I THINK PREVIOUS CASE LAW IS CLEAR. I MEAN THERE ARE MANY THINGS IN THE STATUTE THAT ARE ULTIMATELY NOT CHARGED TO THE JURY, AND USING THE EXAMPLE THAT MR. BRACKETT USED, IN THE PAST YOU WERE NEVER ALLOWED TO SAY 20 YEARS AS AN AGGRAVATING CIRCUMSTANCE OR 30 YEARS, THAT [1839] WOULD BE IMPROPER. AND THAT WOULD BE NO DIFFERENT THAN WHAT THE DEFENSE IS PURPORTING TO DO TODAY, YOUR HONOR.

THE COURT: I DENY THE MOTION.

MR. BANKS: MR. ALL WILL PROFFER THE READING OF THAT.

MR. POPE: YOUR HONOR, I HAVE NO OBJECTION. I THINK THE STATUTE IS WHAT IT IS; I WILL BE GLAD FOR THEM JUST TO TENDER A COPY OF THE STATUTE.

MR. BANKS: WE'LL BE GLAD TO THROUGH THE PROFFER.

[1840] THE LAST THING THAT I RECALL FROM OUR EARLIER CONFERENCE, AND I NEED TO HEAR SOMEONE TALK ABOUT THIS. SECTION 16-320(A) SAYS THE PURPOSE OF THIS SECTION THAT'S, (A), LIFE IMPRISONMENT MEANS UNTIL DEATH OF THE OFFENDER. THAT (A) IS REFERENCED ELSEWHERE, WHERE STATUTORY AGGRAVATING CIRCUMSTANCES FOUND THAT THE SENTENCE OF DEATH IS NOT WARRANTED, THE TRIAL JUDGE WILL SENTENCE THE DEFENDANT TO LIFE IN PRISON AS PROVIDED IN SUB-SECTION (A), THAT IS SUBSECTION (C). AND I HAVEN'T HEARD IT OUT HERE, BUT I JUST WANTED TO MAKE SURE BECAUSE IT WAS CALLED TO MY ATTENTION THAT THE DEFENSE WAS ASKING THAT I CHARGE THAT SENTENCE FOR THE PURPOSE OF LIFE IMPRISONMENT MEANS UNTIL THE DEATH OF THE DEFENDANT. ARE YOU WITHDRAWING THAT?

MR. BANKS: WHEN WE DISCUSSED READING THE STATUTE, IT IS OUR POSITION THAT YOU CANNOT PICK AND CHOOSE ISSUES FROM THE STATUTE.

THE COURT: I'M NOT ASKING FOR ARGUMENT NOW. I JUST REMEMBERED THAT WE HAD TALKED ABOUT THIS, BUT I HAVEN'T HEARD ANY MORE ABOUT IT, SO I WANTED TO MAKE SURE THAT WE AREN'T LEAVING SOMETHING OUT. IS IT YOUR POSITION THAT I [1841] SHOULD CHARGE LIFE IN PRISON MEANS UNTIL DEATH OF THE DEFENDANT. NOT THE WHOLE STATUTE, I WANT TO HEAR ABOUT THIS ONE PHRASE.

MR. BANKS: YES, SIR, IT IS.

THE COURT: WHAT'S THE STATE'S POSITION ON THAT?

MR. POPE: YOUR HONOR, AGAIN, I THINK IT GOES BACK TO NORRIS AND THE PLAIN AND ORDINARY MEANING INSTRUCTION THAT HAS PREVIOUSLY BEEN GIVEN.

THE COURT: I HAVE OBSERVED, AND I THINK YOU HAVE, TOO, AND I THINK EVERYBODY THAT DEALS IN THESE CASES, THE LAW IN OUR SUPREME COURT, THE UNITED STATES SUPREME COURT, AND OUR LEGISLATURE IN THESE CASES CHANGES LIKE THE WIND CHANGES DIRECTION, AND YOU'VE GOT TO FOLLOW THE HISTORY, YOU'VE GOT TO SEE WHAT THE LATEST PRONOUNCEMENT IS, AND YOU'VE GOT TO WRESTLE WITH THAT. AND THAT'S WHERE WE ARE. THAT'S WHY I AM BEING SO PARTICULAR. I'M NOT TRYING TO BE SMART. I AM VERY PARTICULAR ABOUT DATES WHEN WE GET INTO THESE ISSUES.

MR. POPE: I CALL THE COURT'S ATTENTION TO THE CHANGE, AND I'M SURE THE COURT IS AWARE, I WOULD SUBMIT THAT THAT PARTICULAR LANGUAGE SUPPLANTED THE LANGUAGE THAT USED TO INDICATE -

THE COURT: I THINK THE KEY IS TO LOOK AT THE LEGISLATIVE HISTORY AND SEE WHEN THAT WAS ADDED.

MR. POPE: I'LL TELL YOU WHAT I WAS GOING TO SAY INITIALLY WAS THAT PARALLELED

YOU KNOW, WHEN IT USED TO SAY [1842] 20 YEARS AND 30 YEARS, AND NOW IT'S DESCRIBING THAT, BUT I DO NOTE THAT IN THE PREVIOUS STATUTE TO THAT, THAT EXACT SAME LANGUAGE WAS IN THERE.

THE COURT: YOU SAY PREVIOUS, I'M LOOKING AT 1996 BECAUSE THAT'S WHAT I BELIEVE APPLIES HERE.

MR. POPE: IF THAT LANGUAGE IS IN THERE. WHAT I'M SAYING IS THE LANGUAGE WAS IN THERE EVEN WHEN LIFE USED TO MEAN 20 YEARS OR IT USED TO MEAN 30 YEARS. I'M SAYING APPARENTLY IT HAS ALWAYS BEEN IN THERE, THAT SAME LANGUAGE. AND GIVEN THAT SAME LANGUAGE, THE LANGUAGE THAT THE DEFENSE REQUESTED, I DON'T SEE IT NOW, YOUR HONOR.

THE COURT: IT'S ABOUT THE SEVENTH LINE DOWN FROM THE VERY FIRST OF (A).

MR. POPE: I'VE GOT IT. FOR THE PURPOSE OF THIS SECTION LIFE IMPRISONMENT MEANS UNTIL DEATH OF THE OFFENDER. I THINK THAT'S ALWAYS BEEN IN THERE, YOUR HONOR.

THE COURT: ALL RIGHT, WHERE IS IT.

MR. POPE: I'M LOOKING IN THE BOUND VOLUME OF TITLE 16. THIS IS VOLUME 8, THE ONE I HAVE IS A COPYRIGHT 1985, SO I'M LOOKING AT 1985 LAW.

THE COURT: ON 16-320(A)?

MR. POPE: YES, SIR. I WAS ALSO LOOKING AT THE '97 VOLUME. ALL I'M SAYING IS, IT'S CLEARLY IN THERE.

THE COURT: I KNOW IT'S IN THERE NOW. I'M TRYING TO FIND OUT IF IT WAS IN THERE WHEN THESE CASES CAME DOWN. I [1843] THOUGHT YOU SAID IT WAS.

MR. POPE: THAT WAS MY UNDERSTANDING. I WAS REFERRING TO '96 AND '97.

THE COURT: WE'VE GOT TO FIND OUT WHAT THE LEGISLATURE SAID LIFE IMPRISONMENT MEANT WHEN NORRIS WAS ADDRESSED, IF NORRIS IS WHAT YOU ARE RELYING ON.

MR. POPE: YOUR HONOR, IN MY REVIEW IN LOOKING AT NORRIS, I THINK THE PLAIN AND ORDINARY MEANING – AT THIS POINT THE LEGISLATURE HAS ADDRESSED FURTHER THE PLAIN AND ORDINARY MEANING AND CLEARLY DELINEATED IT, AND I SUBMIT THAT THAT WOULD BE PROPER.

THE COURT: TO INCLUDE THAT LANGUAGE?

MR. POPE: YES, UNTIL DEATH. I THINK THAT'S APPROPRIATE.

THE COURT: OKAY, ANYTHING ELSE?

MR. BANKS: NOTHING ELSE, YOUR HONOR.

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[1874] **ARGUMENT TO THE JURY BY MR. POPE**:

LADIES AND GENTLEMEN OF THE JURY, IT HAS BEEN A LONG TWO WEEKS. I KNOW IT SEEMS LIKE MONTHS AGO WHEN YOU WERE FIRST BROUGHT HERE TO REPORT AS A JURY AND ALL OF YOU WERE SELECTED AND GONE THROUGH THE QUESTIONS. YOU WILL RECALL WE TALKED ABOUT THE FIRST STAGE, AND WE'RE PASSED THAT NOW. YOU, BY YOUR VERDICT, HAVE [1875] DETERMINED THAT THE EVIDENCE IS ABUNDANTLY CLEAR, THAT THIS DEFENDANT HAS BEEN FOUND GUILTY OF MURDER; HE HAS BEEN FOUND GUILTY OF CRIMINAL CONSPIRACY; FOUND GUILTY OF ARMED ROBBERY.

SO, WE ARE NOW IN THE SECOND STAGE IN WHICH YOU THE JURY AS THE CONSCIENCE OF THIS COMMUNITY WILL DETERMINE WHAT THE APPROPRIATE PENALTY WILL BE.

WE TOLD YOU BACK WHEN WE TALKED TO YOU THAT WE WERE GOING TO BRING EVIDENCE IN AGGRAVATION, THAT YOU WERE GOING TO HEAR EVIDENCE IN MITIGATION, AND THAT YOU AS JURORS TOLD US THAT YOU COULD TAKE THAT, YOU WOULD CONSIDER ALL OF THAT AND RENDER A JUST VERDICT. AND THAT'S THE POINT WE'RE AT RIGHT NOW.

WHAT I WANT TO DO RIGHT NOW IS TO TELL YOU A LITTLE BIT ABOUT WHAT YOU CAN EXPECT AS FAR AS FROM THE JUDGE, AND WHAT YOUR JOB WILL BE. YOU HAVE GONE THROUGH A POINT SOMEWHAT WHEN YOU WENT BACK TO THE JURY ROOM AND MADE YOUR DETERMINATION IN THE

FIRST PHASE BASED ON YOUR DELIBERATIONS, BUT THIS WILL BE A LITTLE BIT UNIQUE AND I WANT TO TELL YOU A LITTLE BIT ABOUT THAT. AND THEN I'LL TELL YOU, TOO, THAT YOU WILL HAVE ALL OF THE EVIDENCE IN THE JURY ROOM. SO, I'M NOT GOING TO STAND UP HERE AND BATTER YOU WITH THE CASE OVER AGAIN. Y'ALL HAVE SEEN THE AGONY; YOU'VE HEARD THE JURY ARGUMENTS, AND I'M NOT GOING TO DO THAT TO YOU AGAIN.

THE FIRST THING I WANT TO TELL YOU IS THE JUDGE IS GOING TO GIVE YOU THE INFORMATION TO TAKE BACK TO THE JURY [1876] ROOM THAT WILL GUIDE YOU IN HOW YOU MAKE YOUR VERDICT OR HOW YOU MAKE YOUR DECISION, AND THE FIRST STEP THAT WILL HAVE TO BE MADE IS A DETERMINATION OF WHETHER OR NOT THERE ARE AGGRAVATING CIRCUMSTANCES. THE FOREMAN WILL RECEIVE THE PAPERWORK THAT WILL INCLUDE THE INSTRUCTIONS, AND ONE OF THE FIRST DETERMINATIONS YOU MAKE BEFORE YOU CAN EVEN CONSIDER WHETHER THE DEATH PENALTY SHOULD BE GIVEN IS THAT YOU HAVE TO MAKE A DETERMINATION OR A FINDING BY ALL 12 OF YOU AS TO WHETHER THERE ARE AGGRAVATING CIRCUMSTANCES.

THE JUDGE WILL SUBMIT TO YOU ONE AGGRAVATING CIRCUMSTANCE IN THIS CASE, AND THAT'S ALL YOU NEED. YOU JUST HAVE TO FIND ONE. THE JUDGE WILL SUBMIT TO YOU THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED WHILE IN THE COMMISSION OF AN ARMED ROBBERY.

IF YOU WILL RECALL FROM HIS INSTRUCTIONS PREVIOUSLY, AGAIN HE WILL INSTRUCT YOU THAT THE ATTEMPTED ARMED ROBBERY, THAT OUR CASE IS SUFFICIENT FOR A MURDER WHILE IN THE COMMISSION OF AN ARMED ROBBERY - IN OTHER WORDS, THE FACT THAT THEY COULD NOT GET THE CASH REGISTER OPEN DOES NOT CHANGE THE FACT THAT IT WAS AN ATTEMPTED ARMED ROBBERY, AND THAT THIS MURDER WAS COMMITTED WHILE IN THE COMMISSION OF AN ARMED ROBBERY.

THE JUDGE WILL INSTRUCT YOU, AGAIN, THAT YOU MUST DISCUSS IT, YOU MUST MAKE A UNANIMOUS DECISION, BUT I SUBMIT TO YOU THE INDICTMENT THAT YOU RETURNED JUST DAYS AGO ON [1877] ATTEMPTED ARMED ROBBERY IS THAT AGGRAVATING CIRCUMSTANCE. AND THAT BASED ON YOUR DISCUSSION OF THAT EVIDENCE AND YOUR DECISION AS TO THAT EVIDENCE, YOUR FIRST STEP WILL BE MADE AS SOON AS YOU GET IN THERE. AND THAT IS FOR ALL 12 OF YOU TO DECIDE, AND SIGN AS TO THE AGGRAVATING CIRCUMSTANCE.

MR. BANKS: YOUR HONOR, I WOULD OBJECT. THE DELIBERATION IS THE FIRST STAGE, SEPARATE AND INDEPENDENT FROM THESE DELIBERATIONS. AND I WOULD OBJECT TO THAT STATEMENT, THAT BECAUSE THEY HAVE ALREADY MADE THAT DECISION; THEY HAVE MADE IT HERE.

MR. POPE: MAY IT PLEASE THE COURT, YOUR HONOR, I BELIEVE THAT IS A PROPER INFERENCE. I AM SAYING THAT THEY HAVE TO DECIDE WHEN THEY GO IN THERE -

THE COURT: I OVERRULE THE OBJECTION.

CONTINUED ARGUMENT TO THE JURY BY MR. POPE:

AS I SAID, WHEN YOU GO BACK THERE, THE FOREMAN WILL HAVE A FORM WITH AN AGGRAVATING CIRCUMSTANCE OF A MURDER BEING COMMITTED DURING THE COMMISSION OF AN ARMED ROBBERY. AND EACH OF YOU ARE TO SIGN - AGAIN, YOU ONLY SIGN IT IF THAT IS WHAT YOU BELIEVE, AND THAT IS YOUR VERDICT. AND YOU HAVE PREVIOUSLY INDICATED THAT YOU HAVE SO FOUND.

LADIES AND GENTLEMEN, YOU HAVE HAD A TREMENDOUS AMOUNT OF EVIDENCE AS FAR AS THIS CRIME. YOU HAVE BEEN SHOWN A TREMENDOUS AMOUNT OF VIDEO. AND ONE THING I WANT TO DO IS TO URGE YOU WHEN YOU GO BACK TO LOOK AT ALL OF THE [1878] EVIDENCE, TAKE AS LONG AS YOU NEED TO MAKE A FAIR AND JUST DECISION. BUT I SUBMIT TO YOU STATE'S EXHIBIT 5 WHICH IS CALLED THE CASH TAPE VIDEO, STATE'S EXHIBIT 5 WHICH WAS THE CAMERA - YOU'VE GOT 16 CAMERA ANGLES, YOU'RE FREE TO LOOK AT ANYTHING YOU NEED TO LOOK AT BEFORE OR AFTER DURING THIS TIME TO MAKE A DETERMINATION. BUT I SUBMIT TO YOU, STATE'S EXHIBIT 5, THE CASH TAPE, TELLS YOU EVERYTHING YOU NEED TO

KNOW TO MAKE YOUR DECISION. AND I'M GOING TO SHOW YOU A BRIEF EXCERPT OF IT NOW, BUT I ASK YOU WHEN YOU GO BACK IN YOUR JURY ROOM, YOU LOOK AT IT AS MANY TIMES AS YOU NEED. AND YOU LISTEN TO IT; YOU TURN THE VOLUME UP ON THAT T.V. AS LOUD AS YOU NEED TO LISTEN SO THAT YOU CAN DETERMINE WHAT THE LAST WORDS RAY BROOME HEARD WERE.

LADIES AND GENTLEMEN, NOW I AM GOING TO PLAY JUST A BRIEF PORTION, AND I'LL BE QUITE CANDID WITH YOU, THIS IS THE CRIME OF THIS DEFENDANT. I'M NOT GOING TO PLAY THE RECOVERY, AND ALL THE PEOPLE THAT TRIED TO HELP RAY. I'M JUST GOING TO SHOW YOU THIS PORTION, AND THEN I WILL DISCUSS IT WITH YOU FURTHER.

(A PORTION OF THE VIDEO WAS SHOWN TO THE JURY)

YOU LOOK AT THE DEFENDANT, YOU LOOK AT THE CHARACTER OF THE DEFENDANT. YOU WILL HAVE THE EVIDENCE BEFORE YOU.

MY JOB STANDING BEFORE YOU NOW IS TO MAKE AN ARGUMENT BASED ON THE EVIDENCE, AND THE REASONABLE INFERENCES [1879] THAT COME FROM THAT EVIDENCE. IF I STATE SOMETHING DIFFERENT FROM WHAT YOU HAVE SEEN OR WHAT YOU REMEMBER, YOUR JOB, YOUR DUTY IS TO TAKE IT AS YOU REMEMBER IT. BUT I WANT TO POINT OUT SOME ISSUES IN THIS PARTICULAR CASE THAT I THINK MERIT YOUR CONSIDERATION.

LADIES AND GENTLEMEN, YOU'VE SEEN THE TAPE LEADING UP TO THIS. YOU'VE SEEN THE DEFENDANT IN THE STORE; YOU'VE SEEN HIM GO BACK OUT; YOU'VE HEARD TESTIMONY ABOUT HIM PULLING UP THE HOOD AS HE COMES IN THE STORE. AND THEY WANT YOU TO BELIEVE THAT THIS IS SOME KIND OF CONDITIONED RESPONSE, BUT YOU LOOK AT THE VIDEO, AND WHAT YOU SEE ON THE FIRST SHOT – IF THE WHOLE PLAN IS LET'S GO ROB A MAN, DOES IT NOT MAKE SINCE [sic] TO YOU TO SAY THIS IS A STICK-UP, GIVE ME YOUR MONEY? WHAT DO YOU SEE ON THERE? YOU SEE RAY BEHIND THE COUNTER WORKING ON HIS PAPERWORK; HE LOOKS UP, HE'S SHOT.

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[1882] **THE COURT:** I'M GOING TO ASK YOU TO DISREGARD THE LAST ARGUMENT OF COUNSEL, AND INSTRUCT YOU NOT TO CONSIDER THE OMISSION OF ANY TYPE STATEMENTS BY THE DEFENDANT ON THE VIDEO TAPE. YOU MAY PROCEED.

CONTINUED ARGUMENT TO THE JURY BY MR. POPE:

LADIES AND GENTLEMEN OF THE JURY, YOU'LL HAVE THIS EVIDENCE BACK IN THE JURY ROOM, AND YOU LOOK AT THE EVIDENCE. AND I SUBMIT TO YOU THAT THE VIDEO TAPE IS CLEAR, THERE IS NO WAY THAT THIS MAN TRIED TO GET RAY BROOME TO OPEN THE CASH REGISTER BEFORE HE SHOT HIM.

MR. BANKS: OBJECTION, AND MOVE FOR A MISTRIAL.

THE COURT: OVERRULED.

CONTINUED ARGUMENT TO THE JURY BY MR. POPE:

IT'S ABUNDANTLY CLEAR THAT THEY WENT AS FAR AS TO ELIMINATE THE ONE MAN THAT COULD OPEN THE CASH REGISTER BASED ON THE FACT THAT ULTIMATELY THEY COULD NOT GET IN IT.

LADIES AND GENTLEMEN, AGAIN IN JUDGING THE CHARACTER AND CULPABILITY OF THIS DEFENDANT, THINK ABOUT HIS CRIME, YOU THINK ABOUT WHAT HE DID. YOU SAW RAY BROOME, AND [1883] YOU SAW RAY BROOME DROP TO THE FLOOR. WHAT DOES WESLEY SHAFER DO? HE HIT HIM IN THE TEMPLE THE FIRST TIME; WHAT DOES WESLEY SHAFER DO AS MR. BROOME'S LEG IS CURLING UP, HE'S BEEN SHOT IN THE HEAD, HE GOES OVER THE COUNTER AND HE SHOOTS HIM THE SECOND TIME; HE SHOOTS HIM THE SECOND TIME SO CLOSE THAT THERE IS STIPPLING OF GUNPOWDER ON RAY BROOME'S HEAD.

ONE OF THE DEFENSE WITNESSES WOULD HAVE YOU BELIEVE THAT AIL THIS TIME THAT WAS JUST THE CARRYING ON OF THAT CONDITIONED RESPONSE. LADIES AND GENTLEMEN, BETWEEN THE FIRST SHOT 34 SECONDS, AND THE SECOND SHOT 42 SECONDS, THAT WOULD BE EIGHT SECONDS; EIGHT SECONDS BETWEEN THAT FIRST SHOT

AND THE SECOND SHOT. THE TIME THAT WE HAVE STOOD HERE.

I SUBMIT TO YOU, IT IS NOT ABOUT CONDITIONED RESPONSE, IT'S ABOUT MALICE, IT'S ABOUT EVIL INTENT; IT'S ABOUT WESLEY SHAFER'S DESIRE TO INSURE THAT RAY BROOME WAS DEAD.

I WOULD ALSO ASK YOU, AND IT'S NOT ON THIS PICTURE, WHEN YOU'RE CONSIDERING THAT, AND HIS PULSE RATE IS UP, AND HIS BRAIN IS SHUTTING DOWN, AND HE IS CONDITIONALLY RESPONDING TO VIDEO GAMES, AND HE'S SHOOTING, LOOK AT THAT VIDEO WHEN YOU GO BACK THERE. BETWEEN THE PICTURE I HAD UP AND THE PICTURE I SHOWED YOU, HE HAS GONE AS FAR AS TO PUT THE GUN BACK IN HIS POCKET BEFORE HE PULLS IT BACK OUT AND SHOOTS HIM THE SECOND TIME. HE'S STRUGGLING TO GET THE GUN BACK OUT OF HIS POCKET WHEN HE SHOOTS THE MAN AGAIN. YOU CAN [1884] CONSIDER THIS DEFENDANT'S ACTIONS, AND YOU CAN CONSIDER HIS CHARACTER.

YOU'VE HAD TESTIMONY THAT THEY DON'T BELIEVE HE PLANNED ANYTHING, THAT IT WAS JUST ALL CONDITIONED ON THE WAY HE WAS RAISED, AND THE VIDEO GAMES AND ALL OF THAT, BUT HE GOES AND BUYS BULLETS EARLIER THAT AFTERNOON. HE HAD TO GET THAT GUN AT SOME POINT. HE'S SHOWING IT TO HIS FRIENDS, HE'S SHOOTING IT OUT OF THE WINDOW EARLIER THAT EVENING. YOU SEE HIM GO IN AND OUT OF THE

STORE. AND AT SOME POINT THEY GO BACK OUT, AND HE CHOOSES TO PUT THE HOOD UP.

AND REMEMBER, AFTER THEY LEFT HE TOLD MULLINAX THAT THEY WOULDN'T GET CAUGHT. AND THEY WENT AND THEY WERE GOING TO HIDE THEIR SHIRTS.

AND YOU REMEMBER, I THOUGHT THAT WAS INTERESTING, MULLINAX SAID HE WOULDN'T GO IN THE WOODS WITH THEM. REMEMBER WHEN THEY GOT BACK HOME? HE SAID HE WOULDN'T GO IN THE WOODS WITH THEM BECAUSE HE HAD JUST SEEN WHAT HE HAD DONE TO RAY BROOME.

NOW, ANOTHER THING INTERESTING I THINK ABOUT THIS DEFENDANT'S CHARACTER YOU CAN LOOK AT FROM HIS HIDING THE WEAPON. THE SHIRT IS IN EVIDENCE. YOU REMEMBER YOU'VE GOT THE DUKE COAT, YOU'VE GOT THE TROY AIKMEN SHIRT, AND THEN YOU REMEMBER MULLINAX' SHIRT, KIND OF A SHORT SLEEVED BUTTONED UP DRESS SHIRT IN MULTI-COLORED PRINT. HE TAKES THAT SHIRT OFF AT PORTER'S HOUSE, AND GIVES THAT SHIRT TO [1885] WESLEY SHAFER AND PORTER WHEN THEY ARE GOING TO GO OUT IN THE WOODS TO HIDE STUFF. BUT THEN THE NEXT DAY WHEN THE POLICE FINDS ALL OF THE EVIDENCE, WHOSE SHIRT IS WRAPPED AROUND THE GUN? WESLEY SHAFER WRAPS MULLINAX'S SHIRT AROUND THE GUN, AND HIDES HIS AND PORTER'S SHIRTS IN THE BOTTOM OF A CREEK.

YOU CAN JUDGE THE CHARACTER OF THIS DEFENDANT; YOU CAN JUDGE HIS LEVEL OF CULPABILITY. RAY BROOME LIES DEAD, THEY TAKE HIM TO THE HOSPITAL, AND THE NEXT DAY WHERE IS WESLEY SHAFER? HE'S UP AT CASSELL'S STORE, EVERYTHING IS FINE, HE'S GOING TO THE BALL FIELD. AND THAT, TOO, IS SOMETHING YOU CAN TAKE INTO CONSIDERATION AS FAR AS CULPABILITY. THOSE THINGS ARE HAPPENING BEFORE HE IS CHARGED. THOSE THINGS ARE HAPPENING BEFORE HE HAS BEEN CAUGHT, BEFORE WE ARE HERE BEFORE YOU TODAY.

LADIES AND GENTLEMEN, OUR JOB IS TO PUT THE EVIDENCE UP BEFORE YOU, AND THE DEFENSE CERTAINLY HAS THE RIGHT TO PUT UP WHAT THEY CHOOSE. THE JUDGE WILL INSTRUCT YOU THAT YOU CAN BELIEVE THE CREDIBILITY OF ONE WITNESS AGAINST MANY, MANY AGAINST ONE. WHATEVER WAY YOU CHOOSE, YOU USE YOUR OWN COMMON SENSE, AND YOU USE YOUR OWN HUMAN NATURE TO DETERMINE WHO YOU WANT TO BELIEVE. AND WHEN THEY SIT UP HERE AND THEY ARE SELLING SOMETHING TO YOU, OR GIVING SOMETHING TO YOU, YOU USE YOUR OWN COMMON SENSE TO FILTER OUT WHO'S GOT A MOTIVE TO TELL YOU THIS; WHY WOULD THEY TELL YOU THIS; WHAT IS THEIR BIAS; WHAT IS THEIR REASON. AND YOU [1886] ULTIMATELY JUDGE THE WITNESS' CREDIBILITY.

YOU HEARD TESTIMONY ABOUT MR. SHAFER HAVING A CONDITIONED RESPONSE, THAT THIS WAS ALL ABOUT CONDITIONED RESPONSE. THAT IF

YOU HAVE A TOUGH DADDY, AND A LOVING MAMA, AND A BAD FAMILY, AND YOU PLAY VIDEO GAMES, AND YOU WATCH THESE MOVIES THEN YOU'RE GOING TO KILL RAY BROOME DOWN IN LOCKHART.

LADIES AND GENTLEMEN, DO NOT LEAVE YOUR COMMON SENSE IN THIS JURY BOX. YOU HAVE HEARD TESTIMONY ABOUT THIS CONDITIONED RESPONSE, BUT I SUBMIT THAT IF THAT HOLDS TRUE, AND AS THE WITNESS WAS SAYING THAT ULTIMATELY BECAUSE OF THESE MOVIES, YOU GO TO THE MOVIE WITH YOUR GIRLFRIEND, YOU EAT POPCORN, YOU EAT CANDY BARS, AND SO SUDDENLY KILLING IS CONDITIONED WITH GOOD THINGS. IF THAT IS TRUE, THAT IS TRULY A TERROR FOR OUR YOUNG PEOPLE.

BUT I SUBMIT THAT THIS SAME DEFENDANT IF HE WAS CONDITIONALLY TRAINED TO KILL TARGETS AS YOU WERE LEAD TO BELIEVE, WHY DIDN'T HE KILL A COUPLE OF HIS BUDDIES BACK THERE AT THE HOUSE WHEN HE SHOWED THEM THE PISTOL, WHEN HE HAD THE PISTOL EARLIER LIKE MULLINAX SAID. BUT BETTER YET, WHEN THEY ARE THERE AT THE HOT SPOT THE FIRST TIME, POWER BRAKING, PULL OUT, THE TRUCK CHOKES DOWN, THERE IS NO GAME THAT YOU FIRE UP IN THE AIR. HE'S FIRING OUT THE WINDOW. WHY WOULDN'T HE TURN BACK AROUND IN THAT PARKING LOT AND PICK HIM SOME TARGETS BECAUSE THAT'S WHAT HE IS TRAINED TO DO, [1887] THAT'S WHAT HE IS CONDITIONALLY RESPONDED TO DO.

LADIES AND GENTLEMEN, TO EQUATE THIS DEFENDANT'S ACTIONS WITH A SOLDIER IN COMBAT IS A MOCKERY TO A SOLDIER IN COMBAT, AND I HOPE YOU PUT NO STOCK AND NO FAITH IN THAT LINE. HE HAS HAD SEVERAL OPPORTUNITIES TO RELOAD THIS GUN. HE EMPTIED THE GUN, THE GUN WAS FULL. SO, HE IS HANDLING THIS GUN, BUT HE IS CONDITIONALLY RESPONDED TO PICK OUT A TARGET.

THE STATE PUT UP A WITNESS IN REPLY TODAY, AND THERE IS NOTHING HUMOROUS ABOUT THIS CASE. I THINK YOU WILL AGREE THAT WE SEE HUMOR WHEN WE ARE TIRED AND WE GET NERVOUS, BUT THERE IS NOTHING HUMOROUS ABOUT THIS CASE, BUT YOU COULDN'T HELP BUT SEE THE HUMOR IN A 26 YEAR OLD OFFICER AT THE PIZZA HUT LAST NIGHT PLAYING LETHAL ENFORCER. LADIES AND GENTLEMEN, WE DID THAT FOR A REASON. I FELT THAT BASED ON YOUR COMMUNITY EXPERIENCE, YOU MAY BE EXPOSED TO THIS, BUT I DIDN'T KNOW, SO WE GOT A WITNESS TO TAKE THE STAND THAT TELLS YOU WHAT LETHAL ENFORCER IS LIKE. IN ADDITION TO IT BEING A TOY GUN, AND PUTTING QUARTERS IN, YOU'RE AT THE PIZZA HUT AND ALL OF THAT.

THE MOST INTERESTING THING, AND IF YOU'LL REMEMBER THE EXPERT ON CONDITIONED RESPONSE NEVER TOUCHED ON THIS, HE SAID THE ONLY REQUIREMENT IS TO SHOOT, SHOOT, SHOOT. WELL, IF WE ARE TRAINING OUR YOUNG PEOPLE IN THESE GAMES, WHAT WE ARE TRAINING THEM IS DON'T KILL INNOCENT TOWNSFOLK, YOU LOSE

[1888] YOUR BADGE, YOU LOSE YOUR LIFE IF YOU KILL AN INNOCENT TOWNSFOLK.

LADIES AND GENTLEMEN, I SUBMIT THAT THESE GAMES TRAIN YOU TO STOP THE BAD GUYS. THESE GAMES TRAIN YOU TO STOP THE WESLEY SHAFERS, NOT THE RAY BROOMES.

LADIES AND GENTLEMEN, WE HAVE IN THIS CASE AN ATTEMPTED ARMED ROBBERY. BUT I SUBMIT TO YOU THAT ANOTHER CRIME WAS TAKING PLACE FAR WORSE THAN THAT. THIS MAN, IN ADDITION TO BEING A MURDERER, HE IS A THIEF, AND WHAT HE HAS STOLEN HE HAS STOLEN FROM THIS COMMUNITY, AND HE HAS STOLEN FROM THESE PEOPLE; HE HAS STOLEN THEIR HOPES AND DREAMS. HE HAS STOLEN THIS COMMUNITY'S SENSE OF SECURITY. HE WILL NEVER BE THE BEST MAN AT THIS MAN'S WEDDING. HALF OF HER LIFE IS GONE.

I WANT TO MAKE IT CLEAR THAT THIS FAMILY HAS SUFFERED, TOO. BUT THERE IS ONE DISTINCTION. THIS MAN MADE IT HIS CHOICE. HE CHOSE TO PUT THAT PISTOL TO RAY BROOME'S HEAD, NOT ONCE, BUT TWICE; AND HE BROUGHT HIS FAMILY INTO IT. THESE PEOPLE, AND THIS MAN WERE NOT GIVEN THAT CHOICE.

AND SO I KNOW IT'S DIFFICULT, BUT WHEN YOU'RE DEALING WITH THE ANGER AND THE SORROW, I WANT TO MAKE IT CLEAR THE STATE WOULD NEVER ASK YOU TO MAKE A DECISION IN ANGER. I AGREE WITH THE DEFENSE ON ONE

THING, YOU DON'T MAKE A DECISION OUT OF ANGER. YOU MAKE A DECISION OUT OF JUSTICE.

SO, WHEN YOU ARE BALANCING THIS, AND YOU'RE DEALING [1889] WITH IT, YOU'VE ULTIMATELY GOT TO LOOK AT THE CAUSE AND RESPONSIBILITY, AND WHO IS TO BE ACCOUNTABLE FOR THEIR ACTIONS.

HE SAYS HIS FAMILY IS TO BLAME; THE COMMUNITY IS TO BLAME; THOSE KIDS DOWN AT THE HOT SPOT, IF THEY HAD JUST CALLED SOMEBODY, THEY'RE TO BLAME; LAW ENFORCEMENT IS TO BLAME; SOCIETY IS TO BLAME; RAY IS TO BLAME BECAUSE IF RAY HAD JUST CALLED WHEN THE GIRLS FIRST CAME AND SAID DID YOU HEAR THEM OUT THERE SHOOTING, THERE NEVER WOULD HAVE BEEN A KILLING.

BUT, AGAIN, I SUBMIT THAT THAT DOES NOT APPEAL TO YOUR COMMON SENSE, AND HOPEFULLY THAT DOES NOT APPEAL TO YOUR SENSE OF JUSTICE, TO PUT THE BLAME FOR THE DEATH OF RAY BROOME OFF ON SOMEONE ELSE.

LADIES AND GENTLEMEN, IT WAS EXTREMELY DIFFICULT BUT IT WAS IMPORTANT, WHEN YOU HEAR ALL THESE TECHNICALITIES, IT IS IMPORTANT FOR YOU TO HEAR THAT RAY BROOME IS A PERSON, THAT HE IS AN INDIVIDUAL, THAT HE WAS A VICTIM SO THAT RAY BROOME IS NOT REMEMBERED, AS KAREN BROOME HAS TOLD YOU, THAT HE IS EVIDENCE AND YOU CAN'T TOUCH HIM.

THAT'S WHY WE BROUGHT THESE PICTURES; THAT'S WHY WE BROUGHT THE CHRISTMAS VIDEO; THAT'S WHY WE BROUGHT ALL THE DIFFERENT PICTURES, AND YOU'LL HAVE THEM IN THE JURY ROOM, OF RAY. RAY PROBABLY WOULDN'T APPRECIATE US BRINGING A PICTURE OF HIM WITH HIS HAIR IN CURLERS, BUT WE BROUGHT THAT TO YOU. [1890] WE BROUGHT THAT TO SHOW YOU THE MAN WHOSE LIFE HAS BEEN TAKEN, AND THE LOSS THAT THIS FAMILY HAS SUFFERED, AND THE HORRIBLE NATURE OF THIS MAN'S CRIME.

YOU KNOW, WHEN WE PLAYED THE CHRISTMAS VIDEO, AND KAREN WAS TELLING YOU ABOUT THE LITTLE POEM RAY WAS READING, YOU KNOW, SHE WAS EXPLAINING WHAT WAS SAID, IT WAS ALMOST EERIE WATCHING THE VIDEO, AND WATCHING RAY TALKING AND HEARING NO SOUND. AND IT OCCURS TO ME THAT THAT'S WHAT HAPPENED AFTER THIS OFFENSE. HE HAS SILENCED RAY BROOME FOREVER.YOU WILL NEVER HEAR HIM LAUGH; HE WILL NEVER PLAY A JOKE ON THE KIDS AT THE HOT SPOT, AND IT FALLS ON ME TO BE THE VOICE OF RAY BROOME.

WHEN YOU MAKE YOUR DETERMINATION, AND I DON'T PRETEND THAT THIS IS AN EASY JOB, WE KNEW THAT FROM THE BEGINNING, WE DISCUSSED IT WITH YOU FROM THE BEGINNING. WHEN YOU MAKE YOUR DETERMINATION, AND I ANTICIPATE THE DEFENSE WILL GET UP AND SPEAK, THIS WILL BE THE LAST TIME YOU HEAR FROM RAY, I ANTICIPATE THEY MAY HAVE ONE MORE TALK, AND THAT

IS THEIR OPTION, SO THIS IS MY ONE SHOT TO SPEAK TO YOU IN THIS REGARD.

BUT WHEN THEY GET UP, AND THEY TALK ABOUT LIFE IN PRISON VERSUS THE DEATH PENALTY, AND LIFE IN PRISON IS ENOUGH FOR THIS CRIME BECAUSE OF ALL THE BAD THINGS THAT HAPPENED TO HIM IN HIS LIFE IS ENOUGH, I WANT YOU TO THINK SHAFER'S MAMA, HIS SISTER, FAMILY ALL LOVE HIM, AND THEY CAN COOK A [1891] LASAGNA ON SUNDAY AND THEY CAN TAKE IT OVER TO THE JAIL, AND THEY CAN HAVE VISITATION, LOOK THEIR FAMILY IN THE FACE, LOOK THROUGH THE GLASS, AND THEY CAN SEE THIS DEFENDANT. BUT YOU HEARD FROM THIS WOMAN, THE ONLY PLACE THEY VISIT RAY IS AT THE GRAVEYARD. SO, YOU TAKE THAT INTO CONSIDERATION WHEN YOU'RE LOOKING AT JUSTICE.

LADIES AND GENTLEMEN, ONE OF THE SCARIEST THINGS, CERTAINLY THE CRIME, CERTAINLY THE VIDEO, BUT ONE OF THE SCARIEST THINGS I THINK ABOUT THAT SECOND VIDEO, THE VIDEO WHERE WE SAW THE CASH TAPE, THE HORROR AND ALL OF THE SOUND, DO YOU REMEMBER THE GIRLS THAT CAME IN AND WHEN JAMIE PALMER WAS SAYING "OH, GOD; OH, GOD; RAY, RAY" AND THE GIRLS WERE RUNNING IN AND OUT, WE'VE GOT TO GO, WE'VE GOT TO GO, AND I TELL YOU WHAT, I'VE LISTENED TO IT, YOU'VE LISTENED TO IT, AND YOU WILL HAVE A CHANCE AGAIN, BUT WHAT IS REALLY ETCHED IN MY MIND IS MONICA INMAN. REMEMBER JAMIE PICKS UP THAT PHONE AND SHE'S CALLING 911, AND MONICA INMAN

SAYS "COME ON, JAMIE, THEY MIGHT COME BACK, THEY MIGHT COME BACK".

LADIES AND GENTLEMEN, YOU ARE THE CONSCIENCE OF THIS COMMUNITY, AND YOUR VERDICT DOES SEND A MESSAGE TO UNION COUNTY, TO THE STATE. SO THAT THE NEXT TIME SOMEBODY WITH A PISTOL THINKS ABOUT LOADING UP, COMING ACROSS THAT RIVER TO LOCKHART, OVER TO JONESVILLE OR OUT TO BUFFALO OR ANYWHERE IN THIS COUNTY, AND THEY MIGHT COME BACK, THEY MIGHT COME BACK, THEY WILL REMEMBER THIS DAY, AND THEY WILL REMEMBER THIS [1892] JURY, AND THEY WILL REMEMBER THIS VERDICT.

LADIES AND GENTLEMEN, I IN NO WAY WOULD INTIMATE THAT YOU DON'T HAVE A DIFFICULT DECISION. AND I WOULD IN NO WAY INTIMATE THAT IT DOESN'T TAKE THE COURAGE OF YOUR CONVICTION TO DO IT, AND IT'S EASY FOR ME AS A LAWYER TO JUMP UP HERE AND SAY YOU OUGHT TO DO THIS, YOU OUGHT TO DO THIS, YOU OUGHT TO DO THIS. I TRY TO BRING YOU THE EVIDENCE, AND BRING YOU THE REASONS YOU OUGHT TO DO THIS.

IF YOU WANT TO LOOK FOR COURAGE, HEY, YOU KNOW, I'M JUST A CITIZEN, I DON'T WANT TO BE A JUROR, I DON'T WANT TO BE HERE, I DON'T WANT TO BE THRUST IN THE MIDDLE OF THIS; WHEN YOU'RE LOOKING FOR COURAGE, YOU LOOK AT THAT VIDEO TAPE, AND YOU LOOK AT JAMIE PALMER. SHE DIDN'T WANT TO BE THERE; SHE DIDN'T WANT TO BE INVOLVED, BUT SHE GOT ON

THAT PHONE, AND CALLED THAT 911 AND WHEN HER FRIENDS ARE LEAVING AND RUNNING AROUND AND TALKING ABOUT PEOPLE COMING BACK, SHE STAYED, AND YOU WILL HEAR HER, AND YOU'LL HEAR HER SAY "I'M SCARED, I'M SCARED", BUT SHE STAYED. SHE DID WHAT WAS RIGHT, AND WHAT WAS JUST BEYOND ANY MEASURE OF ANY COURAGE.

I'M GOING TO LEAVE YOU, LADIES AND GENTLEMEN, YOU WILL HAVE THE JURY FORM, AND THE PEN WILL BE IN YOUR HAND. YOU TOLD US IN THAT CHAIR THAT IF IT WAS JUST, THAT IF IT WAS THE RIGHT THING TO DO, THAT IF YOU FELT IN YOUR HEART IT WAS RIGHT TO SIGN THAT, THAT YOU COULD GIVE HIM DEATH. JUST LISTEN TO JAMIE'S VOICE AND YOU HEAR HER SAY "HOLD ON RAY; [1893] HOLD ON RAY, HELP'S COMING; HOLD ON RAY". HE'S NOW HOLDING ON FOR YOU. THIS FAMILY HAS HELD ON. AND THEY HOLD ON, AND RAY HOLDS ON.

LET EVERYONE KNOW THAT THIS DAY IN UNION COUNTY JUSTICE WAS DONE IN THIS CASE THAT WILL SEND A MESSAGE OF HOW UNION COUNTY HANDLES A CRIME OF THIS NATURE. THEY HOLD ON; THEY WAIT FOR YOU. WITH NO RESERVATION WHATSOEVER BASED ON WHAT WE HAVE BEFORE YOU, I ASK YOU FOR A VERDICT OF DEATH. ANYTHING LESS WOULD BE A MOCKERY TO THE MEMORY OF RAY AND HIS FAMILY.

I THANK YOU FOR YOUR SERVICE; I THANK YOU FOR YOUR ATTENTION.

THE COURT: I'M GOING TO HAVE TO LET YOU GO TO THE JURY ROOM JUST FOR A FEW MINUTES.

IN CAMERA:

THE COURT: ARE YOU READY TO MAKE A PROFFER?

MR. BANKS: PRIOR TO THE PROFFER, YOUR HONOR, WE RENEW OUR REQUEST TO BE ALLOWED TO DISCUSS RELIGION IN CLOSING ARGUMENT PURSUANT TO THE STATE OPENING THE DOOR ON THE COMMENTS OF JAMIE PALMER OF "OH, GOD; OH, GOD" IN LOOKING FOR COURAGE DURING THAT PHONE CALL.

THE COURT: I DENY THAT.

MR. BANKS: SECONDLY, YOUR HONOR, WE WOULD RENEW OUR REQUEST FOR A LIFE WITHOUT PAROLE CHARGE PURSUANT TO THE STATUTE AND FUTURE DANGEROUSNESS IN THAT IN THE SOLICITOR'S [1894] ARGUMENT HE STATED THAT JAMIE PALMER FEARED THAT "THEY MIGHT COME BACK, THEY MIGHT COME BACK". IN ADDITION TO ANY FUTURE DANGEROUSNESS WE HAD ARGUED BEFORE, THE COURT HAD RULED THAT IT WAS NOT SUFFICIENT FOR A CHARGE OF LIFE WITHOUT PAROLE.

THE COURT: LET ME HEAR FROM THE SOLICITOR ON THAT.

MR. POPE: YOUR HONOR, I THINK IT WAS CLEAR IN THE CONTEXT WE WERE TALKING ABOUT

FUTURE CRIMES NOT RELATED TO THIS DEFENDANT. IT WAS CLEAR WE WERE TALKING IN THE FUTURE CONTEXT OF PEOPLE OTHER THAN THIS DEFENDANT.

THE COURT: I DENY THE MOTION.

MR. BANKS: YOUR HONOR, FINALLY WE WOULD ASK THAT THE COURT REOPEN THE DEFENSE CASE DURING THE SENTENCING TO PRESENT ISSUES OF STATISTICS AND WITNESSES AS TO THE DEATH PENALTY NOT BEING A DETERRENT PURSUANT TO THE SOLICITOR'S COMMENT THAT IT WOULD, A, KEEP OTHERS FROM COMING BACK INTO THE COMMUNITY AND DOING THE SAME THING, AND SAYING THAT IT WOULD SEND A MESSAGE TO THE COMMUNITY TO KEEP OTHERS FROM DOING THE SAME. DETERRENCE IS NOT AN ISSUE UNLESS BROUGHT IN ISSUE BY THE STATE; THE SOLICITOR HAS DONE SO, AND WE ASK FOR TIME TO PRESENT EVIDENCE TO REBUT THAT.

IN THE ALTERNATIVE, WE WOULD ASK THE COURT TO INSTRUCT THE JURY TO COMPLETELY DISREGARD ANY COMMENTS BY THE SOLICITOR IN REGARD TO DANGER TO THE COMMUNITY.

THE COURT: LET ME HEAR FROM THE SOLICITOR ON THAT.

MR. POPE: MAY IT PLEASE THE COURT, YOUR HONOR, I [1895] CAREFULLY REVIEWED THE CURRENT STATE LAW BEFORE MY ARGUMENT.

YOUR HONOR, I CALL THE COURT'S ATTENTION TO STATE V. RICKY GEORGE. YOUR HONOR, THE

ISSUE OF THEM BEING ABLE TO REOPEN THE CASE TO –

MR. BANKS: HAVE YOU GOT A COPY OF THE CASE?

MR. POPE: THAT'S THE ONLY COPY. THERE IS NOTHING TO PREVENT THE DEFENSE FROM ARGUING THAT IT IS NOT A DETERRENT. THEY CERTAINLY HAD THE OPPORTUNITY, IF THEY HAD CHOSE TO, TO PUT UP EVIDENCE IN THAT REGARD PREVIOUSLY. I THINK THE CASES HAVE CLEARLY HELD THAT THAT IS APPROPRIATE ARGUMENT.

THE COURT: HAVE YOU GOT ANYTHING DIFFERENT?

MR. BANKS: NO, SIR, JUST THAT THE ISSUE IN THE GEORGE CASE AND CASES OF THAT NATURE IS ARGUING OUTSIDE THE EVIDENCE. THERE IS NO EVIDENCE THAT IT IS A DETERRENT OR THAT IT IS NOT A DETERRENT. THERE IS NO REASON FOR US TO REBUT EVIDENCE THAT ISN'T THERE.

THE COURT: WELL, AS OUR COURTS OFTEN DO, THEY SAY YOU CAN'T INTRODUCE THAT TYPE EVIDENCE, BUT YOU CAN ARGUE IT. I'M NOT QUESTIONING THE LOGIC OF OUR HIGHER COURTS, BUT I'M GOING TO DENY YOUR MOTION.

MR. BANKS: I'M NOT ARGUING AGAINST YOUR RULING, BUT IF I COULD PROTECT THE RECORD?

THE COURT: YES, SIR.

MR. BANKS: IT CONCERNS ME GREATLY THAT THE STATE [1896] IS ALLOWED TO MAKE THE STATEMENT "THEY MIGHT COME BACK; THEY MIGHT COME BACK", AS NOT BEING FUTURE DANGEROUSNESS, AND THEN ADDING DETERRENT AND THAT IN THE SAME LANGUAGE. IT SEEMS TO ME THAT THOSE ARE INCONSISTENT; AND BASED UPON THAT, I THINK THE STATE AT THE VERY LEAST SHOULD HAVE TO CHOOSE BETWEEN MAKING A DETERRENT ARGUMENT, WHICH INCLUDES FUTURE DANGEROUSNESS, OR NOT ARGUING FUTURE DANGEROUSNESS AND, THEREFORE, NOT MAKING IT A DETERRENT.

I THINK IT'S PREJUDICIAL TO DUE PROCESS TO BE ABLE TO ARGUE ONE, AND MAKE A STATEMENT THAT COULD GO TO FUTURE DANGEROUSNESS, BUT I MEAN IT AS A DETERRENT.

THE STATEMENT BY THE SOLICITOR WAS THAT JAMIE PALMER SAID "THEY MIGHT COME BACK", AND THAT WAS PRE-ARREST. AND HE'S USING THOSE SAME WORDS TO ARGUE DETERRENCE, THEN THOSE WORDS PRE-ARREST ARE IN THE ARGUMENT, AND THAT GOES TO FUTURE DANGEROUSNESS. IF HE'S GOING TO ARGUE, OH, I DIDN'T MEAN WESLEY, THEN IT IS A QUESTION OF DETERRENCE.

THE COURT: WELL, I LISTENED VERY CAREFULLY BECAUSE I HAVE TO ADMIT I HAD SOME CONCERN WHEN THAT ARGUMENT WAS ENTERED INTO AS TO WHETHER WE HAD CROSSED

THE LINE. YOU SAY IT DID. I FIND THAT IT COMES CLOSE, BUT DID NOT; SO, I DENY YOUR MOTION.

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[1906] **ARGUMENT OF THE JURY BY MR. ALL**

THE FIRST CHAPTER OF THE BOOK, WE TALKED ABOUT HOW THAT CHAPTER ENDED. THE SECOND CHAPTER OF THE STORY, WE KNOW THAT IT ENDED IN A WAY THAT WESLEY SHAFER IS GOING TO DIE IN PRISON; WESLEY SHAFER IS GOING TO DIE IN PRISON. THE QUESTION IS WILL THE STATE EXECUTE HIM OR WILL HE JUST DIE IN PRISON. THAT'S YOUR DECISION.

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[1908] WESLEY SHAFER IS LEAVING PRISON IN A PINE BOX. I HATE TO SAY IT, BUT HE IS. WE JUST ASK THAT HE BE ABLE TO SPEND OUT HIS NATURAL LIFE THERE, AND WE DON'T TEACH OUR CHILDREN SOMETHING ABOUT VIOLENCE THAT THEY SHOULD NOT LEARN.

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[1910] **ARGUMENT TO THE JURY BY MR. NETTLES**

WE THOUGHT THAT BEFORE YOU MADE A DECISION AS GRAVE AS THIS THAT YOU WOULD WANT TO KNOW SOMETHING ABOUT THE LIFE OF THE MAN THAT THE GOVERNMENT LAWYERS ARE ASKING YOU TO KILL. AND IN ORDER TO DO THAT WE BROUGHT IN MR. PATRICK GOLDSMITH FROM LANCASTER, SOUTH CAROLINA, AND HE TALKED TO YOU ABOUT THE FACT, AND THIS IS IMPORTANT,

THAT HE HAD IDENTIFIED ABUSE IN WESLEY SHAFER BEFORE THE SHOOTING TOOK PLACE. THIS IS NOT SOMETHING THAT WAS SORT OF COOKED UP BY SOME COURT APPOINTED LAWYERS. THIS IS SOMETHING THAT WAS THERE BEFORE THIS SHOOTING TOOK PLACE. IT'S IMPORTANT FOR THAT REASON. IT WAS THERE BEFORE THE SHOOTING TOOK PLACE, AND IT WAS IMPORTANT TO UNDERSTAND WHAT IT DOES TO CHILDREN.

MR. GOLDSMITH TOLD YOU ABOUT THE ABUSE, POST TRAUMATIC STRESS DISORDER, AND HOW THAT RELATED TO IMPULSE CONTROL. IMPULSE CONTROL IS A FANCY WORD FOR THE REASON THAT SOME OF US DON'T DO THINGS LIKE GO IN A CONVENIENCE STORE AND KILL A WONDERFUL MAN. AND IT'S BEEN INSTILLED IN US, THOSE OF US WHO HAVE BEEN FORTUNATE ENOUGH NOT TO HAVE BEEN ABUSED.

ALCOHOL. YOU KNOW, THERE IS A REASON THAT WE DON'T LET OUR KIDS DRINK UNTIL THEY ARE 21. THEY CAN'T HANDLE THE RESPONSIBILITY. A [sic] 18 YEAR OLD IS DRINKING, HAS AN ADDICTION PROBLEM TO ALCOHOL AND DRUGS BECAUSE HE'S TRYING TO DO SOMETHING ABOUT THE ABUSE INSIDE. IF YOU'VE NEVER KNOWN ANYBODY THAT WAS TORTURED INSIDE, YOU'RE LUCKY. BUT THERE ARE THOSE AMONG US THAT HAVE THINGS THAT HAVE HAPPENED TO [1911] THEM THAT CAUSED THINGS TO BE DIFFERENT INSIDE OF THEM, AND THAT PERSON IS WESLEY SHAFER.

THERE IS A REASON THAT WE CAN'T DRINK UNTIL 21, AND THE GOVERNMENT ENFORCES LAWS ABOUT PEOPLE DRINKING BEFORE THEY ARE 21. BUT THEY DON'T HAVE A PROBLEM WITH PUNISHING SOMEONE THAT'S 18 YEARS OLD, PUTTING A 19 YEAR OLD IN PRISON UNTIL HE IS DEAD.

WE TALKED ABOUT THE ANGER FROM HIS FATHER. THE ANGER FILLED HIM AND ALL OF THESE THINGS, ABUSE, ALCOHOL, ANGER GO TO IMPULSE CONTROL. YOU HAVE NO IMPULSE CONTROL BECAUSE YOU HAVE BEEN BEATEN; YOU DRANK TO SUPPRESS THAT, AND YOU'RE ANGRY AT YOUR DAD. YOU TAKE ACTION WITHOUT EMOTION.

FURTHER, LIEUTENANT COLONEL GROSSMAN TALKED ABOUT CONDITIONED RESPONSE. THERE IS A REASON THAT WHENEVER YOU BRING A POLICE OFFICER IN THAT HASN'T BEEN BEATEN, AND ABUSED AND BURNED THAT HE CAN GO PLAY A VIDEO GAME, AND TALK ABOUT IT CLINICALLY. IT'S NOT JUST THE VIDEO GAMES. IT'S THE VIDEO GAMES, AND THE ABUSE.

WESLEY SHAFER SAW THINGS DIFFERENTLY, AND IT'S TIME THAT HE BE TAUGHT THAT THAT BEHAVIOR IS NOT ACCEPTABLE. AND YOU CAN PUT HIM SOME PLACE UNTIL HE IS DEAD, WHERE HE WILL HAVE THE OPPORTUNITY EVERY SINGLE DAY TO THINK ABOUT WHAT HE HAS DONE. LIFE IN PRISON UNTIL DEATH.

WHAT YOU WERE SHOWN IS THAT YOU HAVE A CONDITIONED [1912] RESPONSE. WESLEY SHAFER IS A PRODUCT OF CONDITIONED RESPONSE, NO

IMPULSE CONTROL, ACTION WITHOUT EMOTION. HIS HEART RATE GOES UP, HE DOES SOMETHING THAT HE DOESN'T UNDERSTAND. AND WHEN THE DETECTIVE CAME IN HERE, HE SAT ON THE STAND AND HE SAID "I ASKED HIM WHY DID YOU DO THAT, AND HE SAID I DON'T KNOW, I'VE BEEN SITTING IN THE WOODS TRYING TO FIGURE IT OUT, I JUST SNAPPED".

YOU KNOW, WESLEY SHAFER DOESN'T UNDERSTAND CONDITIONED RESPONSE. WESLEY SHAFER DIDN'T UNDERSTAND THAT THEY COULD BEAT A CHILD FOR 18 YEARS, AND SOMETHING WRONG IS GOING TO HAPPEN. HE DOESN'T KNOW ANY BETTER BECAUSE HIS DAD BEAT HIS SISTER, TOO. THAT'S WESLEY SHAFER'S LIFE.

ALL OF A SUDDEN WESLEY SHAFER DOES SOMETHING THAT HE KNOWS IS WRONG, AND HE CAN'T FIGURE OUT WHY. I HOPE, WE HOPE, AND WE'RE NOT SAYING THIS IS AN EXCUSE, WE'RE NOT SAYING THAT WESLEY SHAFER SHOULDN'T BE PUNISHED FOR THINGS HE CHOSE AND DECIDED TO DO, WE'RE JUST ASKING YOU NOT TO PUNISH HIM FOR THINGS HE DIDN'T CHOOSE TO DO, THINGS HE DIDN'T DECIDE TO DO. HE DIDN'T CHOOSE TO BE RICKY SHAFER'S SON; HE DIDN'T MAKE THAT DECISION.

HE SHOULD BE PUNISHED FOR THE DECISION HE MADE; HE SHOULD BE PUNISHED FOR THE DECISIONS HE MADE THAT YOU WATCHED ON THESE TELEVISIONS, AND HE SHOULD BE PUNISHED WITH

LIFE IMPRISONMENT. THAT'S THE DECISION HE MADE.

WE'RE GOING TO ASK YOU NOT TO PUNISH HIM FOR THE [1913] DECISIONS HE DIDN'T MAKE. AND WE'RE NOT EXCUSING ANYTHING.

THAT'S EXACTLY WHAT I JUST TALKED ABOUT, WHEN YOU GET ALL OF THIS, WHEN YOU HAVE ARMED ROBBERY WITH A CONDITIONED RESPONSE YOU GET A STATEMENT FROM WESLEY SHAFER LIKE "I JUST DON'T KNOW; I'VE BEEN SITTING IN THE WOODS TRYING TO FIGURE IT OUT". THAT'S WHAT THE DETECTIVE SAID HE SAID. THAT'S WHAT A GOVERNMENT EMPLOYEE SAID HE SAID.

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THE JUDGE IS GOING TO TELL YOU THAT THERE ARE MITIGATORS THAT YOU MUST CONSIDER. YOU MUST CONSIDER THE FACT THAT HE HAS NO PRIOR SIGNIFICANT CRIMINAL HISTORY. WESLEY SHAFER HAS NEVER BEEN TO THE DEPARTMENT OF CORRECTIONS. THIS IS NOT THE REVOLVING DOOR GUY; HE ISN'T THE GUY THAT IS PUT IN PRISON, HE GOT OUT AND DID ANOTHER CRIME. THIS ISN'T THE MAN FOR WHICH THE TERM REVOLVING DOOR IN PRISON WAS TERMED.

WESLEY SHAFER IS GOING TO GO TO PRISON AND STAY THERE. THERE IS NO SIGNIFICANT HISTORY OF VIOLENT CRIMES.

UNDER THE INFLUENCE OF A MENTAL OR EMOTIONAL

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[1914] I KNOW NONE OF YOU WENT INTO A CONVENIENCE STORE AND SHOT ANYBODY, AND THAT'S WHY YOU ARE NOT IN PRISON FOR THE REST OF YOUR LIFE. BUT EVERYBODY THAT IS 18 YEARS OLD HAS DONE SOME THINGS THEY WISH THEY HADN'T DONE; AND WESLEY SHAFER WISHES HE HADN'T DONE IT.

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BUT Y'ALL DON'T HAVE TO DO THAT; YOU DON'T HAVE TO DO THAT. AS A MATTER OF FACT, THE LAW SAYS THAT YOU CAN GIVE LIFE FOR ANY REASON AT ALL. YOU'VE JUST GOT A GUT FEELING, YOU KNOW, THAT MAYBE WESLEY SHAFER MIGHT BE ABLE TO PULL OUT OF THIS DIVE; THERE'S SOME REDEEMING QUALITIES TO HIM THAT [1915] MAYBE IF WE JUST PUT HIM IN A STRUCTURED ENVIRONMENT WHERE HE'S NOT GOING TO GET A GUN, HE'S NOT GOING TO GET ANY ALCOHOL, HE'S NOT GOING TO GET IN FRONT OF A CONVENIENCE STORE CLERK, HE'S NOT EVEN GOING TO GET IN FRONT OF A VIDEO GAME, THAT MAYBE IF WE PUT HIM THERE, SOMETHING GOOD MIGHT HAPPEN. FOR NO OTHER REASON THAN THAT, YOU CAN GIVE LIFE. OR THE FACT THAT THERE ARE THE PRESENCE OF FOUR STATUTORY MITIGATORS.

WHAT IS THE DECISION MAKING PROCESS THAT YOU GO THROUGH. YOU CONVICTED HIM OF MURDER, YOU'VE DONE THAT. YOU DID THAT EARLIER. IF YOU FIND THERE ARE NO AGGRAVATORS, THERE'S GOING TO BE A SHEET BACK THERE YOU

CAN SIGN, ALL 12 OF YOU, AND FIND STATUTORY AGGRAVATOR. YOU'RE GOING TO FIND A STATUTORY AGGRAVATOR, YOU'RE GOING TO FIND THAT.

SO, YOU'VE FOUND A STATUTORY AGGRAVATOR, NOW WHAT DECISION DO YOU HAVE TO MAKE? YOU HAVE TO MAKE THE DECISION OF WHETHER THE MITIGATORS, THESE, ARE JUST ENOUGH THAT YOU CAN SEND HIM, MAKE HIM GO TO PRISON WITH MEN FOR THE REST OF HIS LIFE UNTIL HE DIES OR WHETHER YOU SENTENCE HIM TO DEATH. IT'S JUST A MATTER OF WHERE HE DIES.

I'M ASKING FOR A LITTLE BIT OF MERCY. I'M ASKING FOR THE SMALL AMOUNT OF MERCY THAT IT TAKES TO MAKE A 19 YEAR OLD DIE IN PRISON. I'M ASKING FOR YOU TO LOOK FOR THAT. I'M ASKING FOR THE SMALLEST AMOUNT. WHEN THEY SAY GIVE LIFE, HE'S NOT GOING HOME. YOU CAN FORGIVE HIM IF YOU WANT TO. [1916] THAT'S YOUR DECISION.

I'M JUST ASKING FOR THE SMALLEST AMOUNT OF MERCY IT TAKES TO MAKE A MAN, A CHILD SPEND THE REST OF HIS LIFE IN PRISON.

AND LET'S TALK ABOUT PRISON. IS THERE ANYONE AMONG US WHO WANTS TO SPEND THE REST OF OUR LIFE IN PRISON?

* * *

BE THE ONE PERSON THAT LAYS THE PEN DOWN AND SAY I WANT TO BE REMEMBERED FOR HAVING THE SMALL AMOUNT OF MERCY IT TOOK TO SEND A 19 YEAR OLD TO PRISON FOR THE REST

OF HIS LIFE; THAT'S HOW I WANT TO BE REMEMBERED.

* * *

[1917] **CHARGE TO THE JURY BY THE COURT:**

I'M GOING TO ASK YOU NOW TO GIVE ME YOUR ATTENTION. I APPRECIATE THE ATTENTION YOU HAVE GIVEN US ALL TO THIS POINT.

AS I TOLD YOU EARLIER, I MAY IN THIS INSTRUCTION ALSO USE THE WORD DEFENDANT, AND I AM, OF COURSE, TALKING ABOUT MR. WESLEY AARON SHAFER IF I USE THAT WORD.

THERE ARE TWO RECOMMENDATIONS THAT YOU ARE TO CONSIDER IN THIS CASE. ONE IS THE DEATH PENALTY, THE OTHER IS LIFE IMPRISONMENT. YOU ARE ASKED IN YOUR DETERMINATION OF THIS TO DETERMINE THE EXISTENCE OR NONEXISTENCE OF ANY STATUTORY AGGRAVATING CIRCUMSTANCES, AND I WILL EXPLAIN THAT TO YOU IN A MOMENT.

I WILL REMIND YOU, OF COURSE, THIS IS A TWO PART TRIAL, AND THIS PART IS IN ESSENCE A CONTINUATION OF WHAT HAS ALREADY GONE ON IN THE GUILT PHASE. THE MATTERS YOU HEARD IN THE GUILT PHASE HAVE BEEN INCORPORATED, THEY WEREN'T COMPLETELY RE-PRESENTED, BUT THEY HAVE BEEN PULLED INTO OR INCORPORATED IN THIS TRIAL. SO, ALL OF THE EVIDENCE YOU'VE HEARD IN BOTH PHASES WILL BE FOR YOUR CONSIDERATION OF THE PENALTY IN THIS PHASE.

[1918] I TOLD YOU BEFORE, AND I REMIND YOU THAT I AM THE SOLE JUDGE OF THE LAW, AND YOU MUST TAKE, ACCEPT, AND APPLY THE LAW AS I CHARGE IT TO YOU. AS BEFORE, YOU ARE THE SOLE JUDGE OF THE FACTS. AND YOU ARE THE SOLE JUDGES AND DETERMINERS OF THE RECOMMENDATION.

I HAVE NO OPINION ABOUT THE FACTS; I HAVE NO OPINION ABOUT YOUR RECOMMENDATION. YOU ARE NOT TO TAKE FROM ANYTHING I HAVE SAID OR DONE THROUGHOUT THIS TRIAL AS BEING AN INDICATION OF MY OPINION ON EITHER; THE LAW DOES NOT LET ME HAVE SUCH AN OPINION; IT IS YOUR JOB, AND I WILL NOT INVADE YOUR PROVINCE.

EARLIER I CHARGED YOU AS TO THE OFFENSE OF ATTEMPTED ARMED ROBBERY, AND I DEFINED A DEADLY WEAPON FOR YOU. I TOLD YOU HOW TO EVALUATE EXPERT TESTIMONY. I TOLD YOU EARLIER ABOUT THE CREDIBILITY AND BELIEVABILITY OF WITNESSES, AND HOW YOU CONSIDER AND EVALUATE CREDIBILITY. I TOLD YOU EARLIER HOW YOU ASSESS A STATEMENT ALLEGED TO HAVE BEEN MADE BY ONE CHARGED WITH AN OFFENSE. THERE HAS BEEN AN ADDITIONAL STATEMENT PRESENTED THAT WAS MADE BY MR. SHAFER IN THIS PART OF THE TRIAL, AND YOU CONSIDER THAT STATEMENT UNDER THE SAME GUIDELINES AS I TOLD YOU TO CONSIDER ANY STATEMENTS THAT CAME IN, ALLEGED STATEMENTS THAT CAME IN IN THE GUILT PHASE.

I WILL AGAIN TALK TO YOU ABOUT THE BURDEN OF PROOF, BEYOND A REASONABLE DOUBT. I DEFINED FOR YOU EARLIER THAT THE [1919] STANDARD OF PROOF IN A CASE OF THIS TYPE IS THAT OF BEYOND A REASONABLE DOUBT. THAT BEING THE KIND OF DOUBT THAT WOULD CAUSE A REASONABLE PERSON TO HESITATE TO ACT.

WHEN YOU DELIBERATE IN THIS STAGE, YOU WILL HAVE SOMETHING YOU DID NOT HAVE BEFORE. YOU HAD THE INDICTMENTS, YOU WILL NOT HAVE THEM AT THIS TIME, BUT YOU WILL HAVE SOMETHING CALLED A STATUTORY INSTRUCTION SHEET. IT HAS BEEN PREPARED TODAY, I HAVE SIGNED IT, AND DATED IT. IT IS A GUIDELINE FOR YOU TO FOLLOW IN FOLLOWING MY ORAL INSTRUCTIONS. I WILL GO OVER THOSE WITH YOU.

IN DETERMINING WHETHER OR NOT TO IMPOSE UPON MR. SHAFER THE PENALTY OF LIFE IMPRISONMENT OR DEATH, YOU SHOULD FIRST MAKE CERTAIN DETERMINATIONS REGARDING STATUTORY AGGRAVATING CIRCUMSTANCES.

I TELL YOU THAT LIFE IMPRISONMENT MEANS UNTIL THE DEATH OF THE DEFENDANT.

THE LAW HAS ESTABLISHED, OUR LEGISLATURE HAS, CERTAIN STATUTORY AGGRAVATING CIRCUMSTANCES. THERE IS ONLY ONE THAT APPLIES IN THIS CASE. I AM NOT GOING TO GO OVER ALL OF THEM, BUT THE ONE THAT WOULD APPLY IN THIS CASE, IF YOU SO FIND, AS AN AGGRAVATING CIRCUMSTANCE IS THAT A MURDER WAS COMMITTED WHILE IN THE COMMISSION OF AN ATTEMPTED

ARMED ROBBERY, AN ATTEMPTED ROBBERY WHILE ARMED WITH A DEADLY WEAPON. THAT IS THE ONLY AGGRAVATING CIRCUMSTANCE YOU MAY CONSIDER.

[1920] THESE INSTRUCTIONS THAT I WILL GO OVER WITH YOU IN A MINUTE STATE THAT IF YOU DO NOT UNANIMOUSLY AS A JURY FIND THE EXISTENCE OF ONE AGGRAVATING CIRCUMSTANCE; THAT IS, IF YOU DO NOT FIND THE EXISTENCE OF THAT AGGRAVATING CIRCUMSTANCE, YOU WILL INDICATE ON THE SENTENCE SHEET THAT YOU HAVE SO FOUND, PART ONE, AND I WILL GO OVER THAT WITH YOU IN A MOMENT. THAT HAS TO DO WITH THE VERDICT ON AGGRAVATING CIRCUMSTANCE. IF YOU DO NOT UNANIMOUSLY FIND THE EXISTENCE OF THE AGGRAVATING CIRCUMSTANCE AS SET FORTH ON THE FORM, YOU DO NOT NEED TO GO ANY FURTHER.

IF YOU FIND UNANIMOUSLY THE EXISTENCE OF A STATUTORY AGGRAVATING CIRCUMSTANCE, YOU SHOULD SO INDICATE ON PART B OF THAT FORM. AND IF YOU DO THAT, AND IT MUST BE SIGNED BY EACH MEMBER OF THE JURY, IT HAS TO BE UNANIMOUS; IF YOU FIND THAT, YOU WILL GO FURTHER AND CONTINUE YOUR DELIBERATIONS.

ONCE YOU HAVE UNANIMOUSLY FOUND AND SIGNED AS TO THE PRESENCE OF AN AGGRAVATED CIRCUMSTANCE, YOU THEN FURTHER DELIBERATE, AND DETERMINE WHETHER OR NOT WESLEY AARON SHAFER SHOULD BE SENTENCE [sic] TO LIFE IMPRISONMENT OR DEATH.

I KEEP USING THE WORD STATUTORY AGGRAVATING CIRCUMSTANCE. I'M GOING TO TALK TO YOU IN A MOMENT ABOUT HOW YOU EVALUATE THAT, AND AFTER THAT I WILL GO OVER WHAT ARE CALLED MITIGATING CIRCUMSTANCES.

A STATUTORY AGGRAVATING CIRCUMSTANCE IS A FACT, AN [1921] INCIDENT, A DETAIL OR AN OCCURRENCE WHICH THE GENERAL ASSEMBLY HAS DECLARED BY STATUTE WHICH WOULD MAKE WORSE; THAT IS, AGGRAVATE THE OFFENSE OF MURDER WHEN THE TWO OCCUR IN COMBINATION, OR IF ONE OCCURRED IN THE COMMISSION OF THE OTHER. IN OTHER WORDS, IT IS SOMETHING WHICH INCREASES THE ENORMITY OR ADDS TO THE INJURIOUS CONSEQUENCE OF THE OFFENSE. IF YOU FIND THE EXISTENCE BEYOND A REASONABLE DOUBT OF THE STATUTORY AGGRAVATING CIRCUMSTANCE, THEN YOU ARE PERMITTED, BUT YOU ARE NOT REQUIRED, TO CONSIDER THE DEATH PENALTY.

THERE ARE THREE CONDITIONS THAT YOU SHOULD CONSIDER IN REACHING YOUR DECISION. FIRST, WHETHER OR NOT THERE HAVE BEEN PROVEN THE EXISTENCE OF A STATUTORY AGGRAVATING CIRCUMSTANCE. NEXT, WHETHER THE DEFENDANT HAS PROVEN BY ANY EVIDENCE THE EXISTENCE OF A STATUTORY MITIGATING CIRCUMSTANCE WHICH I WILL GO OVER WITH YOU IN JUST A MOMENT. AND, THIRD, WHETHER OR NOT FOR ANY REASON OR NO REASON AT ALL MR. SHAFER SHOULD BE SENTENCED TO LIFE IMPRISONMENT RATHER THAN TO DEATH BY ELECTROCUTION.

A STATUTORY MITIGATING CIRCUMSTANCE IS A FACT, INCIDENT, DETAIL OR OCCURRENCE WHICH THE GENERAL ASSEMBLY HAS DECLARED BY STATUTE WHICH WOULD REDUCE THE SEVERITY OF THE OFFENSE OF MURDER. IN OTHER WORDS, IF IT IS A CIRCUMSTANCE RECOGNIZED BY STATUTE, AND IS ONE WHICH IN FAIRNESS AND MERCY MAY BE CONSIDERED AS EXTENUATING OR AS REDUCING THE DEGREE OF MORAL CULPABILITY FOR THE COMMISSION OF THE ACT OF MURDER. [1922] A MITIGATING CIRCUMSTANCE IS NOT JUSTIFICATION NOR EXCUSE FOR THE MURDER.

IN THIS CASE THERE ARE FOUR MITIGATING CIRCUMSTANCES, FOUR STATUTORY MITIGATING CIRCUMSTANCES THAT YOU MAY CONSIDER. THEY ARE, ONE, THE DEFENDANT HAS – THESE ARE THE CIRCUMSTANCES YOU MAY CONSIDER: WHETHER THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF A PRIOR CRIMINAL CONVICTION INVOLVING THE USE OF VIOLENCE AGAINST ANOTHER PERSON; WHETHER THE MURDER WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF MENTAL OR EMOTIONAL DISTURBANCE; YOU CAN CONSIDER, THIS IS THE THIRD ONE, THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT, OR TO CONFORM HIS CONDUCT TO THE REQUIREMENT OF THE LAW WAS SUBSTANTIALLY IMPAIRED; AND YOU CAN CONSIDER THE AGE AND MENTALITY OF THE DEFENDANT AT THE TIME OF THE CRIME.

AND THESE ARE SET FORTH ON THE FORMS THAT YOU WILL HAVE IN YOUR JURY ROOM FOR CONSIDERATION.

AS TO AGGRAVATING CIRCUMSTANCES, THESE YOU MUST FIND BEYOND A REASONABLE DOUBT. AS TO THE STATUTORY AGGRAVATING CIRCUMSTANCE, YOU MUST FIND THAT BEYOND A REASONABLE DOUBT.

AS I SAY, YOU MAY ALSO CONSIDER THE STATUTORY MITIGATING CIRCUMSTANCES, AND YOU CAN CONSIDER ANY OTHER MITIGATING CIRCUMSTANCES WHICH IS SUPPORTED BY THE EVIDENCE IN THIS CASE.YOU DO NOT HAVE TO FIND MITIGATING [1923] CIRCUMSTANCES BEYOND A REASONABLE DOUBT.

A STATUTORY MITIGATING CIRCUMSTANCE, AS I TOLD YOU, IS ONE ENACTED BY OUR LEGISLATURE. A NON-STATUTORY MITIGATING CIRCUMSTANCE IS ONE WHICH IS NOT PROVIDED FOR BY THE STATUTE, BUT IS ONE WHICH MR. SHAFER CLAIMS, AND SERVES THE SAME PURPOSE.

WHILE THERE MUST BE SOME EVIDENCE WHICH SUPPORTS A FINDING BY YOU THAT A STATUTORY OR NON-STATUTORY MITIGATING CIRCUMSTANCE EXISTS, AGAIN, YOU NEED NOT FIND THE EXISTENCE OF SUCH BEYOND A REASONABLE DOUBT.

IN REACHING YOUR DECISION AS TO WHICH SENTENCE TO RECOMMEND, YOU WILL CONSIDER

THE AGGRAVATING AND MITIGATING CIRCUMSTANCES. WHILE AN AGGRAVATING CIRCUMSTANCE MUST BE FOUND BEFORE YOU COULD EVEN CONSIDER RECOMMENDING THE DEATH PENALTY, ONCE SUCH A FINDING IS MADE BEYOND A REASONABLE DOUBT, YOU MAY RECOMMEND A SENTENCE OF LIFE - WELL, LET ME START OVER.

IF YOU FIND AN AGGRAVATING CIRCUMSTANCE, A STATUTORY AGGRAVATING CIRCUMSTANCE WHICH MUST BE FOUND BEYOND A REASONABLE DOUBT WHICH IS ONLY HERE ATTEMPTED ARMED ROBBERY - MURDER WHILE IN THE COMMISSION OF THE ATTEMPTED ARMED ROBBERY, IF YOU GO FURTHER AND FIND THE EXISTENCE OF AN ALLEGED STATUTORY MITIGATING CIRCUMSTANCE, WHICH I TOLD YOU NEED NOT BE PROVEN BEYOND A REASONABLE DOUBT, IN AND OF ITSELF THAT IS NOT A BAR TO THE IMPOSITION OF THE DEATH [1924] PENALTY.

IF YOU SHOULD CONCLUDE THAT THE STATUTORY AGGRAVATING CIRCUMSTANCE EXISTS, THE QUESTION THEN IS WHETHER THE DEFENDANT SHOULD BE SENTENCED TO LIFE IN PRISON FOR ANY REASON OR NO REASON AT ALL. IT HAS TRADITIONALLY BEEN REFERRED TO THE RETURNING OF A VERDICT OF LIFE IMPRISONMENT IN THOSE CIRCUMSTANCES FOR NO REASON AT ALL AS BEING A RECOMMENDATION OF MERCY. AND IF YOU FEEL THAT SHOULD BE YOUR VERDICT UNANIMOUSLY, THEN YOU WOULD RECOMMEND LIFE IMPRISONMENT, AND THAT VERDICT WOULD BE SIGNED BY THE FOREMAN ALONE.

IN OTHER WORDS, YOU MAY CHOOSE TO RECOMMEND LIFE IMPRISONMENT IF YOU FIND A STATUTORY OR NON-STATUTORY MITIGATING CIRCUMSTANCE, OR YOU MAY CHOOSE TO RECOMMEND LIFE IMPRISONMENT SIMPLY AS AN ACT OF MERCY.

IN ANY INSTANCE, SHOULD YOU CHOOSE TO RECOMMEND LIFE IMPRISONMENT, YOUR DECISION MUST BE A UNANIMOUS ONE, BUT THE FOREMAN SOLELY WOULD BE REQUIRED TO SIGN THE FORM.

NOW, IN THIS PART OF THE TRIAL THE STATE HAS PRESENTED CERTAIN PREVIOUS CONVICTIONS OF MR. SHAFER. THIS EVIDENCE SHOULD NOT BE CONSIDERED AS SUBSTANTIVE EVIDENCE OF AN AGGRAVATING CIRCUMSTANCE, BUT IF YOU'RE CONVINCED THAT THE DEFENDANT COMMITTED THOSE OFFENSES, THEN YOU MAY CONSIDER THOSE AS EVIDENCE OF HIS CHARACTER, HIS CHARACTERISTICS. THEY MAY BE CONSIDERED ALONG WITH ALL OF THE OTHER EVIDENCE, [1925] AND YOU MAY GIVE THEM WHATEVER WEIGHT YOU DEEM PROPER UNDER THE CIRCUMSTANCES OF THIS CASE.

I INSTRUCT YOU, AND EMPHASIZE TO YOU AGAIN, THE FACT THAT MR. SHAFER EXERCISED HIS CONSTITUTIONAL RIGHT NOT TO TESTIFY IN HIS OWN BEHALF IS NOT TO BE CONSIDERED BY YOU IN ANY WAY IN YOUR DELIBERATION, AND IS NOT TO BE UTILIZED IN YOUR CONSIDERATION OF THE QUESTION OF WHAT SENTENCE SHOULD BE IMPOSED. MR. SHAFER HAD AN ABSOLUTE RIGHT

TO REMAIN SILENT UNDER OUR CONSTITUTION. THE EXERCISE BY HIM OF THAT RIGHT CANNOT AND MUST NOT BE CONSIDERED BY YOU IN ANY FASHION IN YOUR DELIBERATION; IT CANNOT BE USED AGAINST HIM IN ANY RESPECT WHATSOEVER.

YOU ARE TO REACH NO INFERENCE, AND DRAW NO CONCLUSION WHATEVER FROM THE FACT THAT HE EXERCISED HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT. YOU CANNOT EVEN DISCUSS THAT FACT IN THE JURY ROOM.

THE BURDEN OF PROOF IS UPON THE STATE TO PROVE BEYOND A REASONABLE DOUBT THE AGGRAVATING CIRCUMSTANCE AS OUTLINED TO YOU.

THE EXERCISE BY MR. SHAFER OF HIS RIGHT NOT TO TESTIFY IS NOT TO BE CONSIDERED ON THE QUESTION OF WHAT SENTENCE SHOULD BE IMPOSED.

IN DETERMINING THE SENTENCE HE SHOULD RECEIVE, YOU MAY CONSIDER THE EVIDENCE OF THE VICTIM'S PERSONAL CHARACTERISTICS, AND THE EMOTIONAL IMPACT OF THE MURDER ON [1926] THE VICTIM'S FAMILY.

IN CONSIDERING SUCH EVIDENCE, YOU MAY CONSIDER THE VICTIM'S UNIQUENESS AS AN INDIVIDUAL HUMAN BEING.

IN DETERMINING THE DEFENDANT'S, MR. SHAFER'S MORAL CULPABILITY AND BLAMEWORTHINESS, YOU MAY CONSIDER THE SPECIFIC

HARM CAUSED BY THE MURDER, THE CONSEQUENCES OF HIS CRIMINAL ACT, THE IMPACT OF THE MURDER UPON THE VICTIM'S FAMILY, THE PERSONAL CHARACTERISTICS OF THE VICTIM. YOU MAY CONSIDER THE UNIQUE LOSS TO THE VICTIM'S FAMILY CAUSED BY MR. BROOME'S DEATH. YOU MAY CONSIDER THE HUMAN COST OF THE CRIME COMMITTED BY MR. SHAFER.

IN DECIDING WHETHER TO SENTENCE THE DEFENDANT TO DEATH OR LIFE IMPRISONMENT, I REMIND YOU THAT DEATH MEANS JUST WHAT IT SAYS, DEATH. LIFE IMPRISONMENT MEANS INCARCERATION OF THE DEFENDANT UNTIL HIS DEATH.

IT IS NOT NECESSARY THAT ALL OF YOU UNANIMOUSLY AGREE ON THE EXISTENCE OF ANY MITIGATING FACTOR BEFORE YOU AS A JURY MAY CONSIDER IT. THE EXISTENCE OF MITIGATING CIRCUMSTANCES AND THE WEIGHT TO BE ACCORDED TO ANY ARE MATTERS WHICH EACH JUROR MAY DETERMINE FOR HIMSELF.

IT IS NOT NECESSARY FOR THE EXISTENCE OF ANY MITIGATING CIRCUMSTANCE TO BE PROVEN BEYOND A REASONABLE DOUBT, AS I HAVE TOLD YOU. THE DEFENDANT DOES NOT BEAR THAT BURDEN, AND HE NEED NOT PROVE SUCH EXISTENCE OF A MITIGATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT.

[1927] YOU ARE TO CONSIDER EACH AND EVERY MITIGATING CIRCUMSTANCE YOU FIND TO BE SUPPORTED BY THE EVIDENCE BEFORE YOU IN MAKING YOUR DETERMINATION.

YOU MUST CONSIDER MITIGATING CIRCUMSTANCES BECAUSE IF YOU ARE TO MAKE AN INDIVIDUALIZED ASSESSMENT OF THE APPROPRIATENESS OF THE DEATH PENALTY IN THIS CASE AS THE LAW REQUIRES YOU TO DO, EVIDENCE ABOUT THE DEFENDANT'S BACKGROUND AND CHARACTER ARE VERY RELEVANT.

MITIGATING CIRCUMSTANCES DO NOT NEED JUSTIFICATION, AS I HAVE TOLD YOU. RATHER, MITIGATING CIRCUMSTANCES ARE CIRCUMSTANCES WHICH WEIGH IN FAVOR OF IMPOSING THE LIFE SENTENCE UPON THE DEFENDANT AS OPPOSED TO THE PENALTY OF DEATH.

NOW, BEFORE YOU RECOMMEND THE IMPOSITION OF A LIFE SENTENCE, IT IS NOT NECESSARY THAT YOU FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF THE ALLEGED STATUTORY MITIGATING CIRCUMSTANCES OR ANY OTHER RELEVANT MITIGATING CIRCUMSTANCE. WHILE IT IS NECESSARY FOR YOU TO FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE BEFORE YOU COULD RECOMMEND THE SENTENCE OF DEATH.

IT IS NOT REQUIRED THAT YOU FIND THE EXISTENCE OF AT LEAST ONE ALLEGED MITIGATING CIRCUMSTANCE IN ORDER TO RECOMMEND THAT HE, MR. SHAFER, RECEIVE A SENTENCE OF LIFE IMPRISONMENT, IRRESPECTIVE OF WHETHER YOU FIND THE EVIDENCE [1928] OF ANY ALLEGED MITIGATING CIRCUMSTANCE.

EVEN IF YOU DO NOT FIND THE EXISTENCE OF A MITIGATING CIRCUMSTANCE, YOU ARE STILL PERMITTED TO SENTENCE THE DEFENDANT TO LIFE IMPRISONMENT. YOU DO NOT HAVE TO FIND A MITIGATING CIRCUMSTANCE EXISTS BEFORE YOU CAN SENTENCE MR. SHAFER TO LIFE IMPRISONMENT.

AS I TOLD YOU EARLIER, YOU MAY SENTENCE HIM TO LIFE IMPRISONMENT FOR ANY REASON OR FOR NO REASON AT ALL. THE LAW OF OUR STATE PERMITS YOU TO SENTENCE HIM TO LIFE BECAUSE OF THE EXISTENCE OF A MITIGATING CIRCUMSTANCE OR PURELY AND SOLELY, AS I SAID, AS AN ACT OF MERCY.

THE STATUTORY INSTRUCTIONS I HAVE IN MY HAND I AM GOING TO GO OVER WITH YOU BRIEFLY, AND THEN I'M GOING TO GO OVER TWO OTHER SENTENCE MATTERS WE HAVE.

PART ONE OF THE STATUTORY INSTRUCTIONS SAYS IN DETERMINING WHETHER THE DEFENDANT, WESLEY AARON SHAFER, BE SENTENCED TO LIFE IN PRISON OR DEATH, YOU SHOULD FIRST DETERMINE WHETHER THE STATE HAS PROVEN THE EXISTENCE OF THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT. THAT STATUTORY AGGRAVATING CIRCUMSTANCE IS THE MURDER WAS COMMITTED WHILE IN THE COMMISSION OF AN ATTEMPTED ROBBERY WHILE ARMED WITH A DEADLY WEAPON.

IF YOU DO NOT UNANIMOUSLY FIND THE EXISTENCE OF THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE LISTED, YOU SHOULD SO

INDICATE ON PART 1-A OF THE JURY VERDICT FORM ON [1929] AGGRAVATING CIRCUMSTANCE. PART A SAYS "WE THE JURY IN THE ABOVE ENTITLED CASE DO NOT UNANIMOUSLY FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF ANY STATUTORY AGGRAVATING CIRCUMSTANCE". IF YOU FIND THAT UNANIMOUSLY, THAT WOULD ONLY BE SIGNED BY THE FOREMAN.

IF, HOWEVER, THE STATUTORY INSTRUCTIONS TELL YOU THIS, YOU FIND THE EXISTENCE OF THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE AS INDICATED ABOVE, YOU SHOULD SO INDICATE ON PART 1-B OF THE SENTENCING SHEET. YOU'LL SEE ALL THE LINES BELOW THAT. IF THIS FINDING IS UNANIMOUSLY MADE BY YOU, ALL 12 OF YOU, ALL 12 JURORS MUST SIGN INDICATING THAT YOU HAVE UNANIMOUSLY FOUND THE EXISTENCE OF THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE.

IF YOU DO SO, AND THE INSTRUCTIONS TELL YOU THIS, THEN YOU CONTINUE YOUR DELIBERATIONS IN ORDER TO DETERMINE WHETHER YOU SHALL RECOMMEND THE DEFENDANT, WESLEY AARON SHAFER, BE SENTENCED TO LIFE IMPRISONMENT OR TO DEATH.

IN DETERMINING WHETHER TO RECOMMEND THAT MR. SHAFER BE SENTENCED TO LIFE IMPRISONMENT OR TO DEATH, YOU MAY CONSIDER THE STATUTORY AGGRAVATING CIRCUMSTANCE FOUND BY YOU BEYOND A REASONABLE DOUBT,

AND YOU MAY ALSO CONSIDER ANY OF THE FOLLOWING MITIGATING CIRCUMSTANCES WHICH WILL BE IN THERE WITH YOU:

THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF A PRIOR CRIMINAL HISTORY INVOLVING THE USE OF VIOLENCE AGAINST [1930] ANOTHER PERSON;

TWO, THAT THE MURDER WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF MENTAL OR EMOTIONAL DISTRESS;

THREE, THAT THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT WITH THE REQUIREMENT OF THE LAW WAS SUBSTANTIALLY IMPAIRED;

FOUR, THE AGE AND MENTALITY OF THE DEFENDANT AT THE TIME OF THE CRIME.

FURTHER, YOU MAY CONSIDER ANY OTHER MITIGATING CIRCUMSTANCES WHICH YOU FIND ARE SUPPORTED BY THE EVIDENCE IN THE CASE.

WHEN YOU HAVE DETERMINED THE SENTENCE TO BE IMPOSED UPON THE DEFENDANT, YOU WILL INDICATE THAT ON PART TWO OF THE JURY'S DETERMINATION OF THE SENTENCE TO BE IMPOSED.

IF YOUR UNANIMOUS VERDICT IS TO RECOMMEND THAT THE DEFENDANT SHOULD BE SENTENCED TO LIFE IN PRISON, YOU WOULD INDICATE THIS ON THE FORM BY COMPLETING "A" WHICH SAYS THAT "WE, THE JURY IN THE ABOVE ENTITLED

CASE, UNANIMOUSLY RECOMMEND THAT THE DEFENDANT, WESLEY AARON SHAFER, BE IMPRISONED IN THE STATE PENITENTIARY FOR THE BALANCE OF HIS NATURAL LIFE". AND YOU ALONE WOULD SIGN THAT, MR. FOREMAN.

IF THE UNANIMOUS VERDICT OF THE JURY IS A RECOMMENDATION THAT MR. WESLEY AARON SHAFER SHOULD BE [1931] SENTENCED TO DEATH, THIS WOULD BE INDICATED BY THE COMPLETION OF SECTION B OF PART TWO, AND EACH MEMBER OF THE JURY SHALL INDICATE THEIR AGREEMENT WITH THE VERDICT BY SIGNING SAME.

WHATEVER YOUR RECOMMENDATION, WHATEVER YOUR FINDINGS ARE THEY MUST BE UNANIMOUS; THAT IS, IT MUST BE THE VERDICT OF EACH AND EVERY ONE OF ALL TWELVE OF YOU.

IN CONSIDERING WHETHER TO RECOMMEND A SENTENCE OF DEATH OR LIFE IMPRISONMENT, YOU MUST DECIDE THE ISSUE INVOLVED WITHOUT BIAS, WITHOUT PREJUDICE, AND NOT BASED IN ANY ARBITRARY MANNER.

THE STATE AND THE DEFENDANT HAVE A RIGHT TO EXPECT THAT YOU WILL CAREFULLY, AND IMPARTIALLY CONSIDER ALL OF THE EVIDENCE IN THE CASE, AND THAT YOU WILL FOLLOW THE LAW AS I HAVE CHARGED IT TO YOU.

THROUGHOUT THIS CHARGE I HAVE USED THE TERM RECOMMEND A SENTENCE OF LIFE OR RECOMMEND A SENTENCE OF DEATH. PLEASE BE

ADVISED THAT WHILE I HAVE USED THE TERM RECOMMEND, THE SENTENCE OF THE COURT WILL BE WHAT YOU RECOMMEND. I USE THE WORD RECOMMEND SIMPLY BECAUSE OUR STATUTE REQUIRES THAT. BUT I AM TELLING YOU NOW THAT THE SENTENCE YOU SEND TO ME BY WAY OF A RECOMMENDATION WILL IN FACT BE THE SENTENCE THAT THE COURT IMPOSES ON THE DEFENDANT.

NOW, LIKE BEFORE, I HAVE TO GO OVER THIS PART OF MY CHARGE WITH THE ATTORNEYS AND MAKE SURE I HAVE MADE NO ERRORS. IF I HAVE, I WILL BRING YOU BACK IN. IF NOT, I WILL [1932] SEND IN TO YOU THE STATUTORY INSTRUCTIONS, AND PART ONE AND PART TWO FOR YOU TO GO OVER.

I ASK THAT YOU NOT START DELIBERATING UNTIL YOU HEAR FROM ME BECAUSE I HAVE TO MAKE SURE MY INSTRUCTIONS ARE COMPLETE AND ACCURATE.

I DON'T HAVE A WRITTEN CHARGE, ALTHOUGH I DO HAVE WRITTEN INSTRUCTIONS THAT YOU WILL HAVE WITH YOU. BUT IF YOU WISH ME TO GO OVER ANY PRINCIPLES OF LAW, PLEASE LET ME KNOW, AND I WILL BRING YOU BACK OUT AND INSTRUCT YOU.

IF YOU WISH TO LISTEN TO ANY TESTIMONY, LET ME KNOW THAT, AND I WILL BRING YOU BACK OUT AND WE WILL FIND THE TESTIMONY THAT YOU WISH.

IF AT ANY TIME YOU NEED, MR. FOREMAN, TO MAKE SOME KIND OF REPORT TO ME, I'M NOT SUGGESTING THAT YOU MAKE A REPORT, BUT IF YOU FEEL YOU NEED TO COMMUNICATE WITH ME ABOUT ANYTHING GOING ON IN THE JURY ROOM, DO NOT SET FORTH ON ANY NOTE ON HOW THE JURY STANDS REGARDING ANY ISSUE; IF YOU HAVE ANY QUESTIONS, SIMPLY SEND OUT THE QUESTION.

MR. SIMS AND MS. MURPHY, YOU WILL BE SEATED WHERE YOU WERE BEFORE, AND WILL NOT PARTICIPATE IN THE DELIBERATIONS.

I HAVE ORDERED LUNCH FOR YOU AROUND 2:00 O'CLOCK. IF YOU WISH TO STOP FOR LUNCH AND EAT, YOU CAN; IF YOU WISH TO WORK THROUGH LUNCH, YOU CAN. IF YOU NEED A BREAK, LET ME KNOW. YOU ARE ALL ON BREAK, OR YOU ARE ALL AT WORK.

[1933] WHEN YOU REACH A VERDICT OR IF YOU HAVE A QUESTION, JUST KNOCK ON THE DOOR. A BAILIFF WILL BE STATIONED OUT THERE, AND THEY WILL COME GET US AS SOON AS POSSIBLE.

I'M GOING TO LET YOU GO TO THE JURY ROOM, BUT DON'T START YOUR DELIBERATIONS AT THIS POINT.

IN CAMERA:

THE COURT: ANY EXCEPTIONS BY THE STATE?

MR. POPE: MAY IT PLEASE THE COURT, YOUR HONOR, I CALL THE COURT'S ATTENTION TO

THE DOCUMENTATION YOU HAVE GIVEN US, PARTICULARLY PAGE 2240, AND IT REFERS TO – THE COURT'S INSTRUCTIONS SAYS [sic] "IN REACHING YOUR DECISION AS TO WHICH SENTENCE TO RECOMMEND, YOU WILL CONSIDER THE AGGRAVATING AND MITIGATING CIRCUMSTANCES. WHILE AN AGGRAVATING CIRCUMSTANCE MUST BE FOUND BEFORE YOU COULD EVEN CONSIDER RECOMMENDING THE DEATH PENALTY, ONCE SUCH FINDING IS MADE BEYOND A REASONABLE DOUBT", THE PARAGRAPH SAYS "EVEN THOUGH YOU FIND THE EXISTENCE OF MITIGATING CIRCUMSTANCES", THE COURT BEGAN INTO THAT AND SAID RECOMMEND A LIFE SENTENCE. I DON'T THINK YOU REALIZED YOU SAID MITIGATING CIRCUMSTANCE.

YOUR HONOR, I WOULD REQUEST THAT THAT BE INSTRUCTED TO THEM. I DON'T THINK IT WAS CORRECTLY GIVEN TO THEM ORIGINALLY.

THE COURT: ALL RIGHT NOW, TELL ME WHAT I CHARGED, AND TELL ME WHAT YOU SAY I SHOULD HAVE CHARGED.

MR. POPE: YOUR HONOR, ON 2240.

[1934] **THE COURT:** I'M THERE.

MR. POPE: THE BEST I HEARD, YOU SEE THE PARAGRAPH STARTING AT LINE 15.

MR. POPE: ALL RIGHT, I'M WITH YOU.

MR. POPE: I THINK YOU BEGAN THROUGH THAT PARAGRAPH AND GOT TO RECOMMEND THE SENTENCE, AND ACTUALLY I THINK THAT WAS TALKING ABOUT THE DEATH SENTENCE, YOU SAID

A LIFE SENTENCE THERE, AND THEN YOU SAID EVEN THOUGH, AND IT APPEARED AS IF, AND OF COURSE I CAN'T JUDGE WHAT YOU WERE THINKING, BUT IT APPEARS THAT YOU SAW STATUTORY MITIGATING CIRCUMSTANCES, AND KIND OF WENT ON TO ANOTHER THING, AND DIDN'T FINISH. AND I WOULD REQUEST THAT IN ITS ENTIRETY, YOUR HONOR.

THE COURT: WELL, THE QUESTION IS DID I NOT COVER THAT IN THE TOTALITY OF THE CHARGE?

MR. POPE: I DON'T THINK SO, YOUR HONOR.

THE COURT: I THINK I TOLD THEM THAT WHILE AN AGGRAVATING CIRCUMSTANCE MUST BE FOUND BEFORF YOU CAN CONSIDER RECOMMENDING THE DEATH PENALTY, AND I THINK I DID TELL THEM THAT THEY COULD RECOMMEND THAT SENTENCE EVEN THOUGH THEY FOUND THE EXISTENCE OF A STATUTORY MITIGATING CIRCUMSTANCE.

I REMEMBER GETTING A LITTLE CONFUSED ABOUT MY LANGUAGE, AND GETTING OFF TRACK, BUT I THINK I CHARGED THAT. ANYTHING ELSE?

[1935] **MR. POPE:** YOUR HONOR, I WOULD NOTE OUR OBJECTION. IT APPEARS THAT YOU DID NOT INDICATE IN THE BODY THAT THEY HAD TO SIGN THE VERDICT FORM. BUT I DO KNOW THAT YOU GAVE THEM A VERDICT FORM THAT REQUIRES

ALL 12 OF THEM TO SIGN AS FAR AS THE DEATH PENALTY.

WE OBJECTED IN CHAMBERS THAT WE WERE NOT ALLOWED TO CROSS EXAMINE THE JURORS ON SIGNING A FORM, AND I JUST NOTE THE STATE'S OBJECTION TO THAT.

THE ONLY OTHER ITEM I SEE, MR. BRACKETT IS LOOKING AND SAID Y'ALL DISCUSSED IN CHAMBERS THAT YOU WOULD INDICATE LETHAL INJECTION. I THOUGHT YOU SAID ELECTROCUTION.

THE COURT: I DIDN'T MEAN TO SAY EITHER ONE. I THINK I JUST SAID DEATH BECAUSE I DECIDED NOT TO USE EITHER ONE, SO I JUST SAID DEATH.

MR. POPE: YOU DID IN FACT SAY DEATH BY ELECTROCUTION,

MR. BRACKETT: YOU JUST READ THEM RIGHT OFF THE STATUTE. THE STATUTE IS 24-3-530.

THE COURT: I QUITE CANDIDLY CAN'T RECALL MAKING THAT STATEMENT. IF YOU WILL TELL ME WHERE IT IS, WE'LL GO BACK AND FIND IT. BECAUSE THE ONLY PLACE THAT I EVEN HAVE THAT WRITTEN DOWN, I CONSCIENTIOUSLY LEFT OFF AFTER THE WORD DEATH.

MR. POPE: YOUR HONOR, IT WOULD BE ON THE SECOND PAGE, AGAIN, OF THE DOCUMENT THAT YOU GAVE US. YOU SAID, ONE [1936] IS THE DEATH PENALTY WHICH IN THIS STATE IS BY ELECTROCUTION.

THE COURT: I'VE GOT ELECTROCUTION MARKED OUT ON MINE. I FEEL CONFIDENT THAT I DIDN'T SAY IT.

MR. BRACKETT: IT'S ON PAGE 2238. I HAVE IT MARKED ON MY PAGE BECAUSE I TOOK A NOTE WHEN YOU SAID IT. IT'S LINE 9, THE DEFENDANT SHALL BE SENTENCED TO LIFE IMPRISONMENT RATHER THAN DEATH BY ELECTROCUTION.

THE COURT: LET'S GO BACK AND FIND IT, AND SEE IF I SAID THAT BECAUSE IF I DID, I'LL CORRECT IT. DOES THE DEFENSE RECALL WHETHER I SAID IT OR NOT?

MR. BANKS: YOU SAID IT.

THE COURT: OKAY, ALL RIGHT, THANK YOU.

MR. BANKS: I THINK IT'S A MOOT POINT. I MEAN I DON'T THINK IT'S NECESSARY –

MR. BRACKETT: IT'S NOT THE LAW, YOUR HONOR. I DON'T THINK THEY SHOULD BE TOLD THAT IT'S DEATH BY ELECTROCUTION BECAUSE THE STATUTE READS OR AT THE ELECTION OF THE PERSON, LETHAL INJECTION, IT'S AT THEIR OPTION.

THE COURT: ALL RIGHT, SO THE STATUTE HAS NOW CHANGED, BUT AT THIS TIME IT WAS DEATH BY ELECTROCUTION OR LETHAL INJECTION?

MR. BRACKETT: YES, SIR. AT THAT TIME IT WAS THE OPTION OF THE DEFENDANT, AND THAT

IS THE CURRENT LAW. WHAT I CITED TO THE COURT IS SECTION B OF THAT STATUTE.

THE COURT: WHAT WAS THE LAW ON APRIL 13TH, 1997?

[1937] **MR. BRACKETT:** IT WAS AT HIS OPTION.

THE COURT: OKAY, YOU'RE ON RECORD. I'M NOT GOING TO BRING THEM BACK IN AND RECHARGE THEM.

MR. BANKS: OUR ONLY OBJECTION IS OUR PREVIOUS OBJECTION TO THE STATUTORY LANGUAGE NOT BEING CHARGED –

MR. NETTLES: I HAVE TO, JEFF BLUME IS MY BOSS, I WOULD JUST LIKE TO RENEW OUR OBJECTION AS TO THE STATUTORY AGGRAVATOR OF ARMED ROBBERY. THAT'S ALL.

THE COURT: ALL RIGHT. LET ME TELL YOU WHY I'M NOT GOING TO BRING THEM BACK FOR THAT. THE ISSUE IS LIFE OR DEATH. I PROBABLY SHOULDN'T HAVE SAID EITHER ONE, I DIDN'T MEAN TO, QUITE CANDIDLY, BECAUSE I STRUCK IT OUT IN ONE PLACE. WHAT PREJUDICE IS THERE TO THE STATE IN NOT GOING OVER THE CHOICES?

MR. POPE: WE WITHDRAW IT, YOUR HONOR.

THE COURT: ALL RIGHT. CHECK THE STATUTORY INSTRUCTIONS; CHECK PART ONE AND PART TWO. CHECK THE EXHIBITS; SEND THEM IN, AND

TELL THEM TO START DELIBERATING WHEN THESE GO IN.

MR. NETTLES: OBVIOUSLY, MY MOTION IS DENIED?

THE COURT: ALL MOTIONS ARE DENIED. (THE JURY BEGAN THEIR DELIBERATION AT 1:35 P.M.. THE COURT RECEIVED A QUESTION FROM THE JURY AT 5:10 P.M.)

THE COURT: WE HAVE RECEIVED TWO QUESTIONS FROM THE JURY. THE FIRST STATES, QUOTE, IS THERE ANY REMOTE CHANCE [1938] FOR SOMEONE CONVICTED OF MURDER TO BECOME ELIGIBLE FOR PAROLE, END QUOTE. THE SECOND ONE IS, QUOTE, UNDER WHAT CONDITIONS WOULD SOMEONE CONVICTED FOR MURDER BE ELIGIBLE, END QUOTE. IT DOESN'T SAY ELIGIBLE FOR PAROLE, BUT I ASSUME THAT'S WHAT THEY ARE TALKING ABOUT. I'LL BE GLAD TO HEAR FROM THE STATE.

MR. POPE: MAY IT PLEASE THE COURT, YOUR HONOR, I CALL THE COURT'S ATTENTION TO STATE V. KEITH SIMPSON, 479 SOUTHEAST 2D, 57, 1996 CASE; THE STATE VERSUS JASON SCOTT BYRUM, 485 SOUTHEAST 2D 360. I ALSO CALL THE COURT'S ATTENTION BACK TO STATE VERSUS ROBERT SUTHERLAND, 447 SOUTHEAST 2D, 1994. IN PARTICULAR OF INTEREST, I CALL THE COURT'S ATTENTION TO SUTHERLAND, WE FELT IT WAS UNDER THE OLD STATUTE, SUTHERLAND WAS PAROLE INELIGIBLE AND IN THE SUTHERLAND CASE IT GOES RIGHT TO THE TWO PRONGS OF SIMMONS.

AS THE COURT IS AWARE, THE TWO PRONGS OF SIMMONS ARE WHETHER THE STATE LAW PROHIBITS THE DEFENDANT FROM BEING PAROLE ELIGIBLE, AND WHETHER OR NOT THE STATE ARGUES FUTURE DANGEROUSNESS.

YOUR HONOR, I WOULD ARGUE TO BEGIN WITH CLEARLY THE JUDGE HAS RULED THAT FUTURE DANGEROUSNESS HAS NOT BEEN ARGUED AS AN ISSUE. WITH THAT BEING THE CASE, AND THE SECOND PRONG OF SIMMONS HAS NOT BEEN MET, THEREFORE, THE JURY SHOULD NOT BE INFORMED AS TO ANY PAROLE ELIGIBILITY.

IN PARTICULAR, YOUR HONOR, I WOULD CALL THE COURT'S [1939] ATTENTION IN SUTHERLAND, IT SAYS SUTHERLAND CONTENDS THAT THE TRIAL JUDGE VIOLATED BOTH DUE PROCESS AND EIGHTH AMENDMENT BY REFUSING TO INSTRUCT THE JURY THAT HE WOULD BE INELIGIBLE FOR PAROLE. WE DISAGREE. WHEN THE STATE PUTS THE DEFENDANT'S FUTURE DANGEROUSNESS IN ISSUE THE STATE LAW PROHIBITS THE DEFENDANT'S RELEASE, DUE PROCESS REQUIRES THAT HE BE ALLOWED TO BRING PAROLE INELIGIBILITY TO THE JURY'S ATTENTION BY WAY OF ARGUMENT, AND INSTRUCTION. THAT WAS SIMMONS.

HERE IT WAS NOT ARGUED, THEREFORE, FUTURE DANGEROUSNESS IS NOT AN ISSUE. YOUR HONOR, I WOULD SUBMIT THAT THE PROPER CHARGE WOULD BE THE NORRIS CHARGE. WHEN THE ISSUE IS RAISED, THE COURT SHOULD INSTRUCT THE JURY THAT IT SHALL NOT CONSIDER

PAROLE ELIGIBILITY IN REACHING ITS DECISION, AND THAT THE TERM LIFE IMPRISONMENT AND A DEATH SENTENCE SHOULD BE UNDERSTOOD IN THEIR ORDINARY AND PLAIN MEANING. MY ARGUMENT IS THAT'S WHAT IT OUGHT TO BE BASED ON THE JUDGE'S INSTRUCTIONS THAT A LIFE SENTENCE MEANS – I THINKS IT'S LANGUAGE TO THE EFFECT OF UNTIL THE DEATH OF THE OFFENDER.

THE STATE WOULD HAVE NO OBJECTION TO YOU SUBSTITUTING THAT LANGUAGE IN WITH THE ISSUE THAT PAROLE ELIGIBILITY IS NOT A FACTOR; THE CASE LAW IS CLEAR ON THAT, YOUR HONOR. AND THAT IS WHAT WE WOULD REQUEST.

MR. BANKS: YOUR HONOR, WE WOULD ARGUE, OBVIOUSLY, IN THE ALTERNATIVE. WE WOULD ACCEPT THAT THE BASELINE FOR [1940] THIS ARGUMENT IS LIFE IMPRISONMENT MEANS UNTIL DEATH OF THE OFFENDER, WHICH HAS ALREADY BEEN CHARGED. SO, THAT IS THE BASELINE.

WE WOULD ALSO STIPULATE, I THINK THE STATE WOULD AGREE, THE SECOND QUESTION CAN'T BE ANSWERED IN EITHER CASE. SO, WHAT WE'RE LEFT WITH IS THE FIRST QUESTION AND WE WOULD ARGUE SEVERAL THINGS. ONE, THAT THE SIMMONS 1994 CASE WAS PREVIOUS TO THE CHANGES IN THE STATUTE. THE STATUTE WAS SUBSTANTIALLY RE-WRITTEN IN 1995 AND WENT INTO EFFECT ON JANUARY 1, 1996. IT WAS REVISED AGAIN IN 1996, AND WENT INTO EFFECT ON MAY 20TH, 1996. THE 1997 STATUTE HAS REMAINED THE

SAME. THE STATUTE IN EFFECT AT THE TIME OF THE COMMISSION OF THIS CRIME WAS 16-3-20 AND IT ANSWERS THE QUESTION.

AND PREVIOUS TO THE CHANGE IN THE STATUTE, IF THE STATE CHOSE TO SHOW FUTURE DANGEROUSNESS, THEN IT TRIGGERED WHETHER YOU'VE GOT PLAIN AND ORDINARY MEANING OR NOT. SINCE THEN, THE TRIGGER IS NOT FUTURE DANGEROUSNESS, BUT RATHER THERE WAS AN AGGRAVATOR. THE SIMMONS' PRONGS ARE – THAT IF YOU MEET THE FIRST PRONG, THAT WHETHER OR NOT THERE IS PAROLE ELIGIBILITY, THEN YOU HAD TO LOOK FOR THE SECOND PRONG TO SEE WHETHER YOU CHARGED IT OR NOT.

IF YOU HAVE THE FIRST PRONG WHERE THERE IS NO PAROLE ELIGIBILITY, THERE IS NO NEED TO EVEN GET TO THE SECOND. IF THEY FIND AN AGGRAVATOR, WHICH IS THE TRIGGER UNDER THE CURRENT STATUTE, HE IS NOT ELIGIBLE FOR PAROLE. [1941] THE LEGISLATURE HAS MADE THAT CLEAR. NO PERSON SENTENCED TO LIFE IMPRISONMENT PURSUANT TO THIS SECTION IS ELIGIBLE FOR PAROLE, COMMUNITY SUPERVISION, ANY EARLY RELEASE PROGRAM, NOR IS THE PERSON ELIGIBLE TO RECEIVE ANY WORK CREDITS, EDUCATION CREDIT, GOOD CONDUCT CREDIT OR ANY OTHER CREDITS THAT WOULD REDUCE THE MANDATORY LIFE IMPRISONMENT THAT IS REQUIRED BY THIS SECTION.

BECAUSE THERE IS NO PAROLE ELIGIBILITY POSSIBLE IF THEY FIND AN AGGRAVATOR, THE ISSUE OF FUTURE DANGEROUSNESS IS TOTALLY MOOT.

SECOND, THE STATUTE HAS BEEN CHARGED BY THE NUMBER, AND I THINK ONCE A STATUTE IS CHARGED BY THE NUMBER, ANYTHING RELEVANT THEREUNDER SHOULD BE CHARGED. THE COURT HAS PICKED LANGUAGE IN THE MIDDLE OF THAT PARAGRAPH ABOUT LIFE IMPRISONMENT MEANS UNTIL THE DEATH OF THE OFFENDER. THE REMAINDER OF IT IS NOTHING MORE THAN AN EXPLANATION THAT LIFE MEANS UNTIL DEATH. IT DOESN'T ADD ANYTHING TO IT EXCEPT TO EXPLAIN THE LANGUAGE THE COURT HAS ALREADY GIVEN. AND IF THE COURT SAYS I'M GOING TO CHARGE 16-3-20, AND SAYS LIFE IMPRISONMENT MEANS UNTIL DEATH OF THE OFFENDER, AND THE JURY SAYS PLEASE EXPLAIN THAT, THE LEGISLATURE HAS EXPLAINED IT. THEY HAVE EXPLAINED EXACTLY WHAT IT MEANS. WE WOULD ASK THE COURT TO READ 16-3-20 BEGINNING AT "IF THE STATE SEEKS THE DEATH PENALTY" ON THE THIRD LINE, AND ENDING "LIFE IMPRISONMENT REQUIRED BY THIS SECTION", WHICH IS ON ABOUT THE [1942] TENTH OR ELEVENTH LINE.

THE COURT: MR. POPE?

MR. POPE: MAY IT PLEASE THE COURT, YOUR HONOR, I WOULD SUBMIT THAT CLEARLY THAT READING THE STATUTE IS NO DIFFERENT THAN IN THE PAST WHEN THEY HAD 20 YEARS AND

30 YEARS, AND CLEARLY THERE ARE NUMEROUS TIMES WHEN THE COURT WOULD READ THE PERTINENT PART OF THE STATUTE TO GO BEFORE THE JURY WITHOUT READING THE ENTIRE STATUTE. I DON'T THINK THE FACT THAT YOU CITE A STATUTE REQUIRES YOU TO READ –

THE COURT: I'M NOT GOING TO CHARGE THE WHOLE STATUTE, I CAN TELL YOU THAT NOW. LET ME INTERJECT. ARE THERE ANY CASES REGARDING THIS MATTER SINCE THE LANGUAGE WAS CHANGED TO NO PAROLE?

MR. POPE: THE NEWEST CASE I HAVE, YOUR HONOR, IS BYRUM. BUT, AGAIN, BYRUM APPEARS TO BE ELIGIBLE. IT WAS DECIDED DURING THIS TIME, AND IT APPEARS THAT BYRUM WOULD COME UNDER THE PRIOR LAW; IT APPEARS THAT HE WOULD BE ELIGIBLE.

HOWEVER, AGAIN, I WOULD CALL THE COURT'S ATTENTION TO SUTHERLAND IN WHICH THE WHOLE ISSUE IS SOMEBODY BEING INELIGIBLE, AND SUTHERLAND WAS INELIGIBLE, BUT FUTURE DANGEROUSNESS WAS NOT ARGUED, AND IT WAS HELD THAT THERE IS NO REQUIREMENT –

THE COURT: LET ME SEE SUTHERLAND.

(AFTER A PAUSE.)

[1943] THE COURT: TELL ME ABOUT THIS LAST PART HERE, ALTHOUGH THEY START OFF BY SAYING "MOREOVER", ACTING JUSTICE RUSHING. "FUTURE DANGEROUSNESS IS NOT AT ISSUE; MOREOVER, DEFENSE COUNSEL INFORMED THE JURY

THROUGHOUT CLOSING ARGUMENT THAT LIFE IMPRISONMENT FOR SUTHERLAND MEANT THAT HE WOULD NEVER BE RELEASED FROM PRISON"?

MR. POPE: AND I THINK THAT'S WHAT WE'VE GOT HERE, YOUR HONOR.

THE COURT: "ADDITIONALLY, BECAUSE DEFENSE COUNSEL INFORMED THE JURY OF SUTHERLAND'S PAROLE INELIGIBILITY", I DON'T KNOW WHETHER HE DID THAT DIRECTLY OR BY IMPLICATION, "WE FIND HIS EIGHTH AMENDMENT ARGUMENT MERITLESS."

BUT BEFORE THEY GOT THERE, IN THIS CASE – HOW DO YOU DISTINGUISH SUTHERLAND? SUTHERLAND WAS NOT ELIGIBLE FOR PAROLE, FOR A DIFFERENT REASON, GRANTED.

MR. BANKS: WHAT WAS THE QUESTION, JUDGE?

THE COURT: HOW DO YOU DISTINGUISH SUTHERLAND? SUTHERLAND WAS INELIGIBLE FOR PAROLE, A SECOND VIOLENT CRIME.

MR. BANKS: YES, SIR.

THE COURT: SO, UNDER THE VIOLENT CRIMES, HE WAS INELIGIBLE.

MR. BANKS: TWO THINGS, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. BANKS: THE FIRST IS THE STATUTE THAT SAYS HE WAS INELIGIBLE DOES NOT CONTAIN THE SAME LANGUAGE AS THIS ONE [1944] DOES.

THE STATUTE IS IN HERE SOMEWHERE. HERE IT IS. "NO PERSON SENTENCED UNDER THE PROVISIONS OF THIS SUB-SECTION MAY RECEIVE ANY WORK RELEASE CREDITS, GOOD TIME CREDITS OR ANY OTHER CREDITS THAT WOULD REDUCE THE MANDATORY IMPRISONMENT REQUIRED BY THIS SUB-SECTION".

THE STATUTE UNDER SUTHERLAND THAT SAYS PAROLE ELIGIBILITY, DOESN'T SAY NO PAROLE, DOESN'T SAY DEATH. SO, THE DIFFERENCE IS THE MOST THAT SUTHERLAND COULD GET IS LESS THAN THE MOST THAT MR. SHAFER COULD GET UNDER THIS STATUTE. SO, THAT'S THE FIRST DIFFERENCE.

THE OTHER DIFFERENCE IS WE HAVE NOT ARGUED PAROLE INELIGIBILITY BECAUSE WE DIDN'T GET THE CHARGE; WHAT WE HAVE ARGUED IS DEATH. IN SUTHERLAND IT INDICATES THEY ARGUED PAROLE INELIGIBILITY, AND WE HAVEN'T DONE THAT.

THE COURT: BASED ON THE RATIONALE OF SUTHERLAND, THE VAST LINE OF CASES, EVEN THOUGH THEY DEALT TO SOME DEGREE DIFFERING LANGUAGES ON DIFFERENT OCCASIONS, I AM NOT GOING TO CHARGE THE JURY ABOUT PAROLE INELIGIBILITY. I AM SIMPLY GOING TO CHARGE AGAIN THAT LIFE IMPRISONMENT MEANS UNTIL DEATH OF THE OFFENDER.

MR. BANKS: I WOULD NOTE OUR OBJECTION; YOUR HONOR.

THE COURT: CERTAINLY.

MR. BANKS: OUR POSITION IS THAT WESLEY SHAFER IS NOT ELIGIBLE FOR PAROLE; IN SUTHERLAND, HE WAS.

THE COURT: WELL, IN SUTHERLAND THEY WEREN'T.

[1945] **MR. BANKS:** YES, SIR.

THE COURT: I MEAN, LET'S GO BACK AND LOOK AT IT BECAUSE I DON'T WANT TO BE GOING OFF ON SOMETHING I MISUNDERSTAND.

MR. BANKS: UNDER THE SUTHERLAND STATUTE –

THE COURT: I'M NOT LOOKING AT THE SUTHERLAND DEATH PENALTY STATUTE. I'M LOOKING AT THE FACTS AS TO WHETHER OR NOT THE DEFENDANT, ROBERT H. SUTHERLAND, WAS OR WAS NOT ELIGIBLE FOR PAROLE. THIS CASE SAYS HE WAS NOT, FOR A DIFFERENT REASON OTHER THAN WHAT WE ARE TALKING ABOUT TODAY, SO THEY SAID, EVEN IN LIGHT OF THAT, HE WAS NOT ENTITLED TO IT.

MR. BANKS: I UNDERSTAND. IT IS OUR POSITION, WITH ALL DUE RESPECT, THAT UNTIL THE 1995 AND 1996 REVISIONS, EVERYBODY SENTENCED TO LIFE WAS ELIGIBLE FOR PAROLE AFTER SERVING 30 YEARS.

THE COURT: EXCEPT FOR MR. SUTHERLAND.

MR. BANKS: NO, SIR. THE STATUTE SAID THAT HE COULD NOT GET ANY WORK RELEASE CREDITS, GOOD TIME CREDITS, OR ANY OTHER CREDITS THAT WOULD REDUCE THE MANDATORY IMPRISONMENT.

IT IS MY UNDERSTANDING OF THE LEGISLATIVE HISTORY IS THAT YOU HAVE A LIFE 30 AND A LIFE 20, AND THAT YOU HAD TO DO EVERY DAY OF THE 30, AND PAROLE INELIGIBILITY WAS DEFINED AS NO WORK RELEASE CREDITS, ET CETERA. [1946] THE CHANGE IS PAROLE INELIGIBILITY IS NOW DEFINED AS DEATH.

THE COURT: SECTION 24-21-640 AS APPLICABLE TO SUTHERLAND, PROVIDED THE BOARD MUST NOT GRANT PAROLE, NOR IS PAROLE AUTHORIZED FOR ANY PRISONER SERVING A SENTENCE FOR A SECOND OR SUBSEQUENT CONVICTION FOLLOWING A SEPARATE SENTENCING FOR A PRIOR CONVICTION FOR A VIOLENT CRIME AS DEFINED IN SECTION 60.

AGAIN, SUTHERLAND, LIKE MR. SHAFER, IF HE RECEIVED LIFE IMPRISONMENT, WAS NOT ENTITLED TO PAROLE.

MR. BANKS: AND YOU SHOULD GO BACK AND READ 16-3-20(A) AT THAT TIME, IT MEANS THAT THAT 24-21-640 DIDN'T GO INTO EFFECT UNTIL THEY HAD SERVED 30 YEARS. AND THAT'S WHAT THE DEPARTMENT OF CORRECTIONS WAS DOING. THAT'S WHY YOU HAVE A 30 AND A 20. ONCE THEY DID 30 – THEY COULDN'T DO 29, COULDN'T DO 28, BUT ONCE YOU DID 30, THEN THE

ISSUE OF 24-21-640 TRIGGERED. HERE IT DOESN'T. 24-21-640 IS NO LONGER NECESSARY BECAUSE THE EXPLANATION OF PAROLE INELIGIBILITY UNDER THE CURRENT STATUTE IS UNTIL DEATH.

THE COURT: WELL, LEAVING ALL STATUTES OUT, LET'S JUST LOOK AT THE FACTS. HOW IS THE END RESULT AS TO THE INCARCERATION AND POSSIBILITY OF PAROLE DISTINGUISHED FROM SUTHERLAND?

MR. BANKS: IN MY OPINION SUTHERLAND, AFTER 30 YEARS, AFTER DOING EVERY DAY OF 30 YEARS, HE WAS ELIGIBLE [1947] BECAUSE THAT WAS THE SENTENCE. THE PLAIN AND ORDINARY MEANING OF CASES DEALT WITH DEFENSE ATTORNEYS WANTING PEOPLE TO KNOW THAT HE WAS GOING TO HAVE TO DO LIFE. AND THE SOLICITOR'S OFFICE WAS SAYING, NO, WE CAN'T TELL THEM THAT BECAUSE THEY CAN GET OUT IN 30 AND 24-21-640 WAS THERE.

THE PLAIN AND ORDINARY MEANING STACK OF CASES, AND ALL THE CASES THAT USED THAT LANGUAGE WAS BECAUSE THE STATE – I MEAN BECAUSE THE DEFENSE WANTED THEM TO THINK THEY WOULD NEVER GET OUT. AND THE STATE SAID, NO, YOU CAN'T CHARGE THAT BECAUSE THEY ARE ELIGIBLE IN 30. AND THAT'S WHAT THE LAW WAS.

AND THE PLAIN AND ORDINARY MEANING WAS AGAINST THE DEFENSE, AND A BENEFIT TO THE STATE BECAUSE THEY WERE NOT ALLOWED TO BE TOLD IT WOULD BE 30. THE LEGISLATURE, YOU

KNOW, IT'S A BIG HOT TOPIC, IS NO PAROLE, TRUTH IN SENTENCING. SO, THEY HAVE DEFINED UNDER THE NEW MURDER STATUTES THAT NO PAROLE MEANS DEATH; IT MEANS NO WORK CREDITS, IT MEANS NO COMMUNITY SUPERVISION – I MEAN EVERY POSSIBLE OPTION OF THE DEPARTMENT OF CORRECTIONS HAS NOW SAID THAT THAT DOESN'T APPLY.

MR. POPE: MAY IT PLEASE THE COURT, YOUR HONOR, I THINK THE COURT IS AWARE THAT SUTHERLAND STOOD IN EXACTLY THE SAME STEAD, REGARDLESS OF HOW HE GOT THERE. HE WAS INELIGIBLE, AND THAT'S WHAT THE SUPREME COURT SAYS IN THAT CASE.

[1948] YOUR HONOR, THE COURT HAS ALREADY RULED. MY UNDERSTANDING IS THAT THE COURT WILL INSTRUCT THE JURY THAT THEY SHOULD NOT CONSIDER PAROLE ELIGIBILITY AND WILL GIVE AN INSTRUCTION AS TO WHAT LIFE OR DEATH IS AS GIVEN PREVIOUSLY.

MR. BANKS: AND IT IS MY FINAL POSITION THAT THE STATE KNOWS IN THIS CASE THAT UNDER THE CURRENT LAW THAT IF THEY FOUND AN AGGRAVATING CIRCUMSTANCE, THAT MR. SHAFER WILL DIE IN PRISON. I THINK THE JURY OUGHT TO BE TOLD THAT.

THE COURT: LET ME ASK ONE LAST QUESTION OF THE STATE. THE CASES THAT HAVE APPROVED STATING THEY NEED NOT CONSIDER PAROLE ELIGIBILITY, IS THAT MANDATED BY CASE LAW?

MR. POPE: I'M NOT SURE I UNDERSTAND.

THE COURT: UNDER THE PLAIN AND ORDINARY MEANING.

MR. POPE: YOUR HONOR, GOING ALL THE WAY BACK TO NORRIS, IT SAYS, "WHEN THE ISSUE IS RAISED, THE COURT SHOULD INSTRUCT THE JURY THAT IT SHALL NOT CONSIDER PAROLE ELIGIBILITY IN REACHING ITS DECISION, AND THAT THE TERMS LIFE IMPRISONMENT AND DEATH SENTENCE SHOULD BE UNDERSTOOD IN THEIR PLAIN AND ORDINARY MEANING". YOUR HONOR, THAT IS THE POSITION OF THE STATE. I AM WILLING TO CONCEDE, SINCE THE JUDGE HAS GIVEN THE DEFENSE THAT ADDITIONAL INSTRUCTION, THAT YOU ADD IN THERE AS FAR AS THE DESCRIPTION OF LIFE BASED ON THE STATUTE. BUT, AGAIN, YOUR HONOR, IT SAYS "THE COURT SAYS WHEN THE ISSUE IS RAISED, THE COURT SHOULD INSTRUCT THE JURY THAT IT SHALL NOT CONSIDER" – WHAT YOU ARE GETTING BY THE [1949] NOTE THAT YOU HAVE FROM THE JURY, YOUR HONOR, IS THAT THE JURY IS ASKING FOR GUIDANCE AND INSTRUCTION ON SOMETHING THAT SURELY THE CASE LAW SAYS THEY SHOULD NOT BE THINKING ABOUT AND CONSIDERING. THAT'S WHY OUR SUPREME COURT HAS SAID THAT YOU SHOULD TELL THEM – IF THAT QUESTION COMES UP, AS IT HAS IN THE PAST, THAT YOU SHOULD TELL THEM THAT THEY SHOULD NOT BE CONSIDERING THAT.

MR. BANKS: YOUR HONOR, PRIOR TO – SIMMONS IS POST SULLIVAN; SIMMONS CAME

AFTER SULLIVAN, AND PRIOR TO THIS STATUTE, PRIOR TO 16-3-20(B) CHANGE, THE SOLICITORS IN THE STATE OF SOUTH CAROLINA WOULD SAY I AM GOING TO SERVE NOTICE OF THE DEATH PENALTY IF YOU DON'T PLEAD, AND YOUR GUY NEEDS TO PLEAD BECAUSE HE IS ELIGIBLE IN 30 YEARS. NOW, THEY SAY HE CAN GET LIFE UNTIL DEATH.

JURIES FROM MAY 30TH, 1996 HAVE THREE OPTIONS IN THE STATE OF SOUTH CAROLINA. WE FIND NO AGGRAVATING CIRCUMSTANCES; THEREFORE, YOU GET LIFE. IN WHICH CASE IT IS THE PLAIN AND ORDINARY MEANING. WE FIND AGGRAVATING CIRCUMSTANCES, IN THAT CASE YOU GET LIFE UNTIL YOU DIE IN PRISON WITH NO PAROLE ELIGIBILITY, NO WORK CREDITS. WE FIND AGGRAVATING CIRCUMSTANCES, WE SENTENCE DEATH.

THERE ARE THREE CLEAR OPTIONS. IN THIS CASE IT'S SUPPOSED THAT THERE ARE TWO CLEAR OPTIONS, AND SUTHERLAND AND CASES UNDER PREVIOUS STATUTES ARE INAPPLICABLE IN THIS SITUATION.

[1950] **MR. POPE:** YOUR HONOR, THEY ARE NOT INAPPLICABLE BASED ON WHERE SUTHERLAND STOOD AS FAR AS PAROLE ELIGIBILITY AND AS FAR AS WHAT YOU ARE LOOKING AT.

YOUR HONOR, IT IS CLEAR THAT THE ISSUE, AND WE CAN ARGUE ALL EVENING ABOUT IT, BUT THE ISSUE IS THEY SHOULD NOT CONSIDER PAROLE ELIGIBILITY, AND THAT IS CLEAR, YOUR HONOR.

YOUR HONOR, I WANT TO MAKE IT CLEAR, TOO. MR. BRACKETT PULLED UP SUTHERLAND, YOU HAVE MY COPY, SIMMONS IS QUOTED IN SUTHERLAND, SO IT DID IN FACT COME AFTER.

THE COURT: WELL, I'M GOING TO CHARGE THIS. THIS IS MY RULING. CERTAINLY YOU CAN EXCEPT NOW AND AFTER THE CHARGE. MY RESPONSE, I'M GOING TO CHARGE THEM: YOUR CONSIDERATION IS RESTRICTED TO WHAT SENTENCE TO RECOMMEND. I WILL, AS TRIAL JUDGE, IMPOSE THE SENTENCE YOU RECOMMEND. SECTION 16-3-20 OF THE SOUTH CAROLINA CODE OF LAWS PROVIDES THAT FOR THE PURPOSE OF THIS SECTION LIFE IMPRISONMENT MEANS UNTIL THE DEATH OF THE OFFENDER. PAROLE ELIGIBILITY IS NOT FOR YOUR CONSIDERATION.

MR. BANKS: WE WOULD ASK THE COURT TO TAKE OFF THE LANGUAGE OF PAROLE ELIGIBILITY IN THERE. BECAUSE HAVING RULED AGAINST US, I AM NOW ARGUING THAT TO IMPLY PAROLE ELIGIBILITY IS NOT TO BE CONSIDERED BY THEM IS TO IMPLY THAT IT IS AVAILABLE.

THE COURT: IT'S STICKY-WICKY ON THAT PROPOSITION BECAUSE THEY KEEP CHANGING THE LAW, BUT I'M GOING BACK AND [1951] LOOKING AT THESE CASES, AND THEY PRETTY WELL SAY, UNDER DIFFERENT LANGUAGE ADMITTEDLY, BUT THAT'S ALL I'VE GOT TO GO ON, PAROLE ELIGIBILITY, CASES AS LATE AS 1995, YOUNG, THE COURT CITING NORRIS, THE COURT CHARGED PURSUANT TO NORRIS THAT THE JURY WAS NOT TO CONSIDER

PAROLE ELIGIBILITY, AND GOES INTO THE PLAIN AND ORDINARY MEANING.

I KNOW THE STATUTE HAS CHANGED SINCE THEN. IT GOES FURTHER –

MR. POPE: YOUR HONOR. WITH ALL DUE RESPECT, YOUR HONOR, THIS COULD GO ON FOREVER. THE COURT HAS MADE A RULING, AND WE'VE BOTH BEEN GUILTY OF ARGUING WHEN THE COURT HAS MADE A RULING, BUT WE HAVE A JURY OUT, AND I WOULD ASK THAT YOU GIVE THE INSTRUCTION YOU SAID YOU WOULD.

THE COURT: I'LL DETERMINE WHEN TO DO THAT. I APPRECIATE IT, BUT I AM RELAXING THE RULES, I MEAN PARTICULARLY THIS IS A VERY THORNY ISSUE, WE ARE ALL AWARE OF THAT.

MR. POPE: YES, SIR.

THE COURT: AND THIS IS A DEATH PENALTY CASE; WE ARE ALL AWARE OF THAT.

MR. POPE: YES, SIR.

THE COURT: AND MY COMFORT LEVEL HAS TO BE WHERE I FEEL IT OUGHT TO BE.

MR. BANKS: YOUR HONOR, I'M NOT ASKING FOR LEAVE TO ARGUE AGAINST THE RULING, BUT INFORMING THE COURT. THE STATE [1952] OF THIS CASE HAS BEEN ARGUED IN THE STATE OF SOUTH CAROLINA VERSUS SUTHERLAND, AND THE STATE VERSUS SIMMONS, THE SIMMONS THAT I AM ARGUING, AND PERHAPS I HAVE NOT MADE

MYSELF CLEAR, IS SIMMONS VERSUS SOUTH CAROLINA 129 LAWYERS EDITION 2D, 133, SUPREME COURT 2187 WHICH IS A 1994 CASE.

MR. POPE: AND IT'S CITED IN SUTHERLAND, YOUR HONOR.

MR. BANKS: IT WAS REVERSED ON DUE PROCESS GROUNDS ON THE TRIAL COURT'S FAILURE TO TELL THE JURY THE TRUTH REGARDING THE CAPITAL OFFENDER'S PAROLE INELIGIBILITY IF SENTENCED TO LIFE IN PRISON –

THE COURT: ALL RIGHT, WHERE IS THAT? I'VE GOT THE CASE YOU'RE TALKING ABOUT.

MR. POPE: YOUR HONOR, IN SUTHERLAND THAT WE'VE HANDED UP IT'S HEADNOTE 2425 –

THE COURT: HE'S REFERRING ME TO A U.S. SUPREME COURT CASE.

MR. POPE: AGAIN, SIMMONS IS A U.S. SUPREME COURT CASE CITED IN SUTHERLAND.

THE COURT: I'VE JUST SIMPLY ASKED HIM TO SHOW ME WHERE IT WAS; THERE CAN'T BE ANYTHING OFFENSIVE ABOUT THAT. TELL ME WHERE IT IS?

MR. BANKS: YOUR HONOR, I JUST HAVE THE HEADNOTE.

THE COURT: THE WORD DANGEROUSNESS IS THE FIRST THING THAT POPS IN MY MIND. THAT'S FUTURE DANGEROUSNESS [1953] AGAIN. I'VE RULED.

MR. BANKS: I WOULD ASK THE COURT TO RULE ON OUR SECOND REQUEST THAT YOU STOP WHERE YOU SAY UNTIL THE DEATH OF THE OFFENDER. IT SEEMS TO ME THAT THE COURT IS GOING BACKWARDS IF YOU TELL THEM THEY CAN'T CONSIDER PAROLE ELIGIBILITY BECAUSE THAT CERTAINLY IMPLIES THAT HE MAY BE ELIGIBLE. SO, I AM GOING TO ASK THE COURT TO CHARGE WHAT YOU CHARGED THE JURY THE FIRST TIME.

THE COURT: I'M GOING TO STICK BY MY RULING. BRING THE JURY IN.

IN THE PRESENCE OF THE JURY:

THE COURT: MR. FOREMAN, I HAVE RECEIVED YOUR QUESTIONS. BEFORE I GET TO THAT, LET ME DO ONE HOUSEKEEPING MATTER. IT IS GETTING CLOSE TO 6:00 O'CLOCK, IT USUALLY TAKES 45 MINUTES OR SO OR AN HOUR TO GET ANY KIND OF MEAL HERE. IF YOU DETERMINE YOU WISH TO ORDER A MEAL FOR DINNER, JUST SEND US OUT A NOTE, AND WE WILL DO IT. I'M NOT ASKING YOU TO DECIDE THAT NOW, BUT I DON'T WANT YOU TO BE IN THERE WONDERING WHAT IS GOING ON AS FAR AS WHETHER YOU WILL GET TO EAT OR NOT. SO, IF YOU DECIDE AT ANY TIME THAT YOU DESIRE TO EAT, JUST LET US KNOW.

NOW, YOUR QUESTIONS WERE TWO. FIRST, QUOTE, IS THERE ANY REMOTE CHANCE THAT SOMEONE CONVICTED OF MURDER COULD BECOME ELIGIBLE FOR PAROLE, END QUOTE. AND

THE SECOND IS, QUOTE, UNDER WHAT CONDITIONS WOULD SOMEONE CONVICTED FOR [1954] MURDER BE ELIGIBLE, END QUOTE.

I ANSWER THAT IN THIS FASHION. YOUR CONSIDERATION IS RESTRICTED TO WHAT SENTENCE TO RECOMMEND. I WILL REMIND YOU THAT WHAT YOU RECOMMEND IS WHAT I WILL IMPOSE AS TRIAL JUDGE.

SECTION 16-3-20 OF OUR CODE OF LAWS AS APPLIES TO THIS CASE IN THE PROCESS WE'RE IN, STATES THAT, QUOTE, FOR THE PURPOSES OF THIS SECTION LIFE IMPRISONMENT MEANS UNTIL THE DEATH OF THE OFFENDER, END QUOTE.

PAROLE ELIGIBILITY OR INELIGIBILITY IS NOT FOR YOUR CONSIDERATION.

ALL RIGHT, I'LL LET YOU GO BACK AND CONTINUE TO DELIBERATE.

(THE JURY RETIRED AGAIN AT 6:00 O'CLOCK P.M.)

IN CAMERA:

THE COURT: ALL RIGHT, IS THERE ANYTHING FROM THE STATE?

MR. POPE: NO, SIR, YOUR HONOR,

THE COURT: ANYTHING FROM THE DEFENSE?

MR: BANKS: YES, YOUR HONOR, WE WOULD RENEW OUR OBJECTION UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH

AMENDMENTS OF THE STATE AND FEDERAL CONSTITUTIONS.

THE COURT: YOUR EXCEPTION IS NOTED.

MR. BANKS: THANK YOU. IN ADDITION, YOUR HONOR, I WOULD ASK THE COURT TO CHARGE THE JURY THAT IF THEY ARE [1955] BETWEEN –

THE COURT: START OVER, I'M SORRY.

MR. BANKS: I'M GETTING TIRED, JUDGE.

THE COURT: NO, IT'S JUST A NOISY COURTROOM.

MR. BANKS: I WOULD ASK THE COURT TO ADVISE THE JURY THAT IF THEY ARE BETWEEN TWO POSSIBLE SENTENCES, THAT THE BENEFIT INURES TO THE DEFENDANT.

THE COURT: I DENY THAT.

MR. BANKS: THANK YOU.

THE COURT: ALL RIGHT, WE WILL BE AT EASE.

(THE JURY NOTIFIED THE COURT THAT THEY HAD AGREED ON A VERDICT AT 7:20 P.M.)

THE COURT: I UNDERSTAND WE HAVE A VERDICT. SOME OF YOU PERHAPS HAVE NOT BEEN HERE BEFORE. I ASK THAT YOU RESTRAIN ANY EMOTIONS, WHATEVER THE VERDICT MAY BE, AND I DO NOT KNOW WHAT IT WILL BE. IF YOU CANNOT, FEEL YOU CANNOT CONSTRAIN YOURSELF I ASK

THAT YOU LEAVE THE COURTROOM AT THIS TIME. IF YOU DO EXPRESS EMOTION AND DISRUPT THE COURT, YOU WILL BE IN CONTEMPT OF COURT, AND WE CERTAINLY DON'T WANT THAT BECAUSE I WOULD HAVE TO IMPOSE SOME SORT OF PENALTY ON THAT PERSON.

IS THERE ANYTHING FROM THE STATE BEFORE THE JURY COMES IN?

MR. POPE: NO, SIR, YOUR HONOR.

THE COURT: THE DEFENDANT?

[1956] **MR. BANKS:** NO, SIR.

THE COURT: ALL RIGHT, BRING THE JURY IN.

IN THE PRESENCE OF THE JURY:

THE COURT: MR. FOREMAN, I UNDERSTAND THE JURY HAS REACHED A VERDICT?

THE FOREMAN: YES, SIR.

THE COURT: IF YOU WOULD HAND IT UP BY WAY OF THE BAILIFF.

(THE VERDICT FORMS WERE GIVEN TO THE COURT.)

THE COURT: IN THE CASE OF THE STATE OF SOUTH CAROLINA VERSUS WESLEY AARON SHAFER, JR., COUNTY OF UNION, COURT OF GENERAL SESSIONS, 97-GS-44-419, PART ONE, THE JURY'S VERDICT ON PROOF OF AGGRAVATING CIRCUMSTANCE. WE, THE JURY IN THE ABOVE ENTITLED CASE, UNANIMOUSLY FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF THE FOLLOWING

STATUTORY AGGRAVATING CIRCUMSTANCE: THE MURDER WAS COMMITTED WHILE IN THE COMMISSION OF ROBBERY WHILE ARMED WITH A DEADLY WEAPON. IT IS SIGNED BY ALL 12 JURORS.

PART TWO, THE JURY'S DETERMINATION OF THE SENTENCE TO BE IMPOSED. WE, THE JURY IN THE ABOVE ENTITLED CASE, UNANIMOUSLY RECOMMEND THAT THE DEFENDANT, WESLEY AARON SHAFER, BE SENTENCED TO DEATH. IT IS SIGNED BY ALL 12 JURORS.

WE WILL POLL THE JURY. MADAM CLERK, WILL YOU POLL THE JURY PLEASE.

[1957] **THE JURY WAS POLLED BY THE CLERK AS FOLLOWS:**

Q. BILLY F. ABEE; IS THIS THE VERDICT TO WHICH YOU AGREED?

A. IT IS.

Q. IS IT STILL YOUR VERDICT?

A. YES, IT IS.

THE COURT: DID YOU, MR. ABEE, FIND A STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT IN THIS CASE?

A. I DID.

Q. ARTONGA JONES, IS THIS THE VERDICT TO WHICH YOU AGREED?

A. YES.

Q. IS IT STILL YOUR VERDICT?

A. YES, MA'AM.

THE COURT: MS. JONES, DID YOU FIND A STATUTORY AGGRAVATING CIRCUMSTANCE IN THIS CASE BEYOND A REASONABLE DOUBT?

A. I DID.

Q. SUSAN ADAMS, IS THIS THE VERDICT TO WHICH YOU AGREED?

A. YES, MA'AM.

Q. IS IT STILL YOUR VERDICT?

A. YES, MA'AM.

THE COURT: MS. ADAMS, DID YOU FIND A STATUTORY AGGRAVATING CIRCUMSTANCE IN THIS CASE BEYOND A REASONABLE DOUBT?

A. YES, SIR.

[1958] Q. SHERRIE SUMNER, IS THIS THE VERDICT TO WHICH YOU AGREED?

A. YES, MA'AM.

Q. IS IT STILL YOUR VERDICT?

A. YES, MA'AM.

THE COURT: MS. SUMNER, DID YOU FIND A STATUTORY AGGRAVATING CIRCUMSTANCE IN THIS CASE BEYOND A REASONABLE DOUBT?

A. YES, SIR.

Q. JOHN T. JEFFRIES, IS THIS THE VERDICT TO WHICH YOU AGREED?

A. YES.

Q. IS IT STILL YOUR VERDICT?

A. YES.

THE COURT: MR. JEFFRIES, DID YOU FIND A STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT?

A. YES.

Q. JOHN CRAIG, IS THIS THE VERDICT TO WHICH YOU AGREED?

A. YES.

Q. IS IT STILL YOUR VERDICT?

A. YES, MA'AM.

THE COURT: MR. CRAIG, DID YOU IN THIS CASE FIND A STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT?

A. I DID.

Q. DANIEL DAVIS, IS THIS THE VERDICT TO WHICH YOU AGREED?

A. YES, MA'AM.

[1959] Q. IS IT STILL YOUR VERDICT?

A. YES, MA'AM.

THE COURT: MR. DAVIS, DID YOU IN THIS CASE FIND A STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT?

A. YES, SIR.

Q. EMILY SMITH RUSSELL, IS THIS THE VERDICT TO WHICH YOU AGREED?

A. YES, MA'AM.

Q. IS IT STILL YOUR VERDICT?

A. YES, IT IS.

THE COURT: MS. RUSSELL, DID YOU FIND A STATUTORY AGGRAVATING CIRCUMSTANCE IN THIS CASE BEYOND A REASONABLE DOUBT?

A. YES, SIR, I DID.

Q. CHARLES MEADOW, IS THIS THE VERDICT TO WHICH YOU AGREED?

A. IT IS.

Q. IS IT STILL YOUR VERDICT?

A. YES, IT IS.

THE COURT: MR. MEADOW, DID YOU FIND IN THIS CASE A STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT?

A. YES, I DID.

Q. JILL LAWSON, IS THIS THE VERDICT TO WHICH YOU AGREED?

A. YES, MA'AM.

Q. IS IT STILL YOUR VERDICT?

[1960] A. YES, MA'AM.

THE COURT: MS. LAWSON, DID YOU IN THIS CASE FIND A STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT?

A. YES, SIR.

Q. JOHN GREGORY, IS THIS THE VERDICT TO WHICH YOU AGREED?

A. YES.

Q. IS IT STILL YOUR VERDICT?

A. YES.

THE COURT: MR. GREGORY, DID YOU IN THIS CASE FIND A STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT?

A. YES.

Q. WAYNE HEFNEY, IS THIS THE VERDICT TO WHICH YOU AGREED?

A. YES, MA'AM.

Q. IS IT STILL YOUR VERDICT?

A. YES, IT IS.

THE COURT: MR. HEFNEY, DID YOU FIND IN THIS CASE A STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT?

A. YES, SIR.

THE CLERK: THEY ALL ANSWERED IN THE AFFIRMATIVE.

THE COURT: IS THERE ANYTHING FROM THE STATE BEFORE THE JURY IS DISMISSED?

MR. POPE: NO, YOUR HONOR.

[1961] **THE COURT:** ANYTHING FROM THE DEFENSE?

MR. HANKS: YES, YOUR HONOR; I WOULD ASK THAT THE JURY BE EXCUSED.

THE COURT: I'M GOING TO ASK YOU TO GO TO THE JURY ROOM JUST FOR A FEW MINUTES.

IN CAMERA:

THE COURT: YES, SIR?

MR. BANKS: YOUR HONOR, BASED UPON THE ISSUES THAT WERE RAISED BY THE QUESTIONS FROM THE JURY, I WOULD ASK THE COURT TO POLL THE JURY AS TO THE SPECIFIC QUESTION AS TO WHETHER PAROLE ELIGIBILITY, THEIR BELIEF THEREIN, GAVE RISE TO THEIR VERDICT.

AT THE SAME TIME, I WOULD SPECIFICALLY REQUEST THAT THE COURT INQUIRE AS TO WHETHER JUROR NUMBER 233 WHO WORKS FOR PROBATION AND PAROLE, EXPRESSED PERSONAL KNOWLEDGE IN THE JURY'S DELIBERATION OUTSIDE OF THE EVIDENCE AND THE LAW GIVEN.

THE COURT: I DENY THAT REQUEST. ANYTHING FURTHER?

MR. BANKS: NO, SIR.

THE COURT: WELL, I AM GOING TO DISMISS THE JURY, AND THEN WE WILL TAKE CARE OF OTHER BUSINESS. BRING ALL 14 JURORS IN.

IN THE PRESENCE OF THE JURY:

THE COURT: MEMBERS OF THE JURY PANEL, FIRST I WANT TO THANK YOU FOR YOUR

ASSISTANCE; THIS HAS BEEN TOUGH. I [1962] APPRECIATE YOUR PATIENCE WITH ME; I APPRECIATE YOUR TIME AND YOUR CONSCIENTIOUS FULFILLMENT OF YOUR DUTIES. I'M NOT GOING TO KEEP YOU, YOU'VE BEEN HERE LONG ENOUGH.

I DO WANT TO TELL YOU, AND I'M GOING TO GIVE YOU THIS IN WRITING AS YOU LEAVE, OUR SUPREME COURT HAS INSTRUCTED IN CASES SUCH AS THIS THAT I GIVE YOU THE FOLLOWING INSTRUCTIONS. THIS IS BASED ON A STATUTE PASSED BY OUR LEGISLATURE:

AFTER YOUR SERVICE IN THIS TRIAL HAS CONCLUDED, YOU HAVE THE RIGHT TO EITHER REFUSE TO DISCUSS THE VERDICT YOU HAVE RENDERED OR TO DISCUSS THE VERDICT TO THE EXTENT YOU SO DESIRE.

IF YOU CHOOSE TO DISCUSS THE VERDICT, YOU ARE FREE TO TERMINATE, WHICH OF COURSE MEANS TO STOP, ANY SUCH DISCUSSION AT ANY POINT. IF THE PERSON WITH WHOM YOU ARE SPEAKING CONTINUES TO PURSUE A DISCUSSION OF THE VERDICT AFTER YOU HAVE COMMUNICATED A DESIRE TO TERMINATE THE DISCUSSION OR IF THE PERSON CONTINUES TO HARASS YOU AFTER YOU HAVE REFUSED TO DISCUSS THE VERDICT, YOU SHOULD REPORT THAT PERSON TO THE HONORABLE JUNE H. MILLER, UNION COUNTY CLERK OF COURT, P.O. BOX 200, UNION, SOUTH CAROLINA 29379; TELEPHONE NUMBER 864-429-1630. SIGNED BY ME AND DATED THIS DAY.

I WILL HAVE THE BAILIFF TO HAND ONE OF THESE TO EACH OF YOU. GO AHEAD WHILE THEY ARE STILL SEATED.

(EACH JUROR WAS GIVEN THE PAPER.)

[1963] **THE COURT:** IS THERE ANYTHING FURTHER FROM THE STATE?

MR. POPE: NOTHING FURTHER, YOUR HONOR.

THE COURT: FROM THE DEFENSE?

MR. BANKS: NO, SIR.

THE COURT: AGAIN, I THANK YOU VERY MUCH FOR YOUR ASSISTANCE IN THIS MATTER. YOU MAY EXIT THE COURTROOM. (AFTER THE JURY LEFT THE COURTROOM)

THE COURT: ALL RIGHT, WOULD YOU BRING MR. SHAFER AROUND?

(THE DEFENDANT, ALONG WITH HIS COUNSEL, APPROACHED THE BENCH.)

THE COURT: IS THERE ANYTHING FROM COUNSEL FOR THE DEFENDANT?

THE COURT: YOUR HONOR, WE WOULD LIKE TO HAVE LEAVE OF 10 DAYS TO MAKE POST TRIAL MOTIONS. NOTHING AS TO SENTENCING, YOUR HONOR.

THE COURT: MR. SHAFER, IS THERE ANYTHING YOU WISH TO SAY?

MR. SHAFER: NO, SIR.

THE COURT: YOU DON'T WANT TO SAY ANYTHING?

MR. SHAFER: I APOLOGIZE TO THE FAMILY.

THE COURT: I FIND AFFIRMATIVELY THAT THE DEATH PENALTY IN THIS CASE WAS WARRANTED UNDER THE EVIDENCE OF THIS CASE AND WAS NOT THE RESULT OF PREJUDICE, BIAS OR IN ANY [1964] OTHER ARBITRARY MANNER.

MR. SHAFER, ON 97-GS-44-420, THE INDICTMENT ON THE ATTEMPTED ARMED ROBBERY, THE SENTENCE OF THE COURT IS FOR THIRTY YEARS, AND THAT'S CONSECUTIVE TO THE SENTENCE ON THE MURDER CHARGE WHICH IS 97-GS-44-419.

ON 97-GS-44-421, CRIMINAL CONSPIRACY, THE SENTENCE OF THE COURT IS FOR FIVE YEARS. THAT'S CONSECUTIVE TO BOTH 97-GS-44-419, AND 97-GS-44-420. THE SENTENCE ON 97-GS-44-419, THE CHARGE OF MURDER, THE SENTENCE OF THE COURT IS THAT WESLEY AARON SHAFER, THE DEFENDANT NAMED IN THIS INDICTMENT, IS SENTENCED TO DEATH.

THE SENTENCE HEREIN IS PURSUANT TO SECTION 16-3-20 OF THE CODE OF LAWS. BY VIRTUE OF THE FINDING OF THE JURY ON THIS THE 21ST DAY OF JANUARY, 1998, MR. SHAFER, YOU ARE TO BE KEPT INCARCERATED BY THE APPROPRIATE AUTHORITIES, AND SUFFER THE SENTENCE OF DEATH BETWEEN THE HOURS OF 6:00 A.M. AND 6:00 P.M. ON JUNE 21ST, 1998.

DO YOU UNDERSTAND ALL OF THAT?

MR. SHAFER: YES, SIR.

THE COURT: ANYTHING ELSE?

MR. ALL: YES, YOUR HONOR, THE PENALTY FOR THE ATTEMPTED ARMED ROBBERY, WHAT IS THE SENTENCE ON THAT?

MR. POPE: MAY WE APPROACH, YOUR HONOR?

THE COURT: YES.

(COUNSEL APPROACHED THE BENCH AND HAD A CONFERENCE WITH THE [1965] COURT OFF THE RECORD)

THE COURT: IT'S BEEN CALLED TO MY ATTENTION, I DID MAKE AN ERROR. THE SENTENCE ON 97-GS-44-420, MR. SHAFER, INSTEAD OF THIRTY YEARS IS TWENTY YEARS, AND THAT'S CONSECUTIVE TO THE MURDER CHARGE. ANYTHING FURTHER FROM THE STATE?

MR. POPE: NO, SIR, YOUR HONOR.

THE COURT: ANYTHING FURTHER FROM THE DEFENSE?

MR. BANKS: NO, SIR.

THE COURT: I AM GOING TO ASK THAT THE INDIVIDUALS ON THE LEFT REMAIN SEATED WHILE THE INDIVIDUALS ON THE RIGHT EXIT, AND THEN THE INDIVIDUALS ON THE LEFT CAN EXIT THE COURTROOM.

ALL RIGHT, COURT IS ADJOURNED.

(WHEREUPON, THE CASE ENDED.)

[Note from Sentencing Jury]

[Handwritten Originally]

1) Is there any remote chance for someone convicted of murder to become eligable [sic] for parole?

2) Under what conditions would someone convicted for murder be eligable. [sic]

Court's Exhibit #7
1-21-98 JF

THE STATE OF SOUTH CAROLINA
In The Supreme Court

State of South Carolina, Respondent,

v.

Wesley Aaron Shafer, Jr., Appellant.

Appeal From Union County
John C. Hayes, III, Circuit Court Judge

Opinion No. 25120
Heard October 7, 1999 – Filed May 8, 2000

AFFIRMED

David I. Bruck, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, of Columbia; and Solicitor Thomas E. Pope, of York, for respondent.

BURNETT, A.J.: Appellant admitted he shot and killed Ray Broome while attempting to rob the convenience store where Broome was working. Appellant maintained the killing was without malice.[1] A jury

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[1] During the penalty phase of trial, appellant's expert witness testified appellant shot Broome in response to a lifetime of abuse and violence.

convicted appellant of murder, attempted armed robbery, and conspiracy. He was sentenced to death for murder and consecutive terms of twenty years' imprisonment and five years' imprisonment, respectively, for attempted armed robbery and conspiracy.[2] Appellant appeals.

FACTS

Around 11:30 p.m. on April 12, 1997, appellant and Justin Porter drove to the Hot Spot, a convenience store, in Porter's truck. Appellant and Porter entered the store. When they returned to the truck, Porter, the driver, spun the back tires of the vehicle and appellant, using his father's gun and bullets he purchased earlier, fired four or five shots from the passenger window as they drove away.

At approximately 1:00 a.m., appellant, Porter, and Adam Mullinax returned to the Hot Spot. Witnesses left the Hot Spot because they suspected trouble.

Appellant, Porter, and Mullinax entered the Hot Spot. Mullinax went into the bathroom then returned to the truck. Appellant and Porter also went into the store, then stood outside the Hot Spot for a few minutes. While Broome was away from the cash register, Porter entered the Hot Spot. He tried to open the cash register but was unsuccessful. He returned outside.

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[2] The jury found the statutory aggravating circumstance of murder while in the commission of an attempted armed robbery while armed with a deadly weapon. S.C. Code Ann. § 16-3-20(C)(a)(1)(d) (Supp. 1998).

Porter and appellant entered the store again. Broome had returned to the register booth. Appellant went to the checkout counter and shot Broome from several feet away. Broome fell to the floor. Appellant walked to another side of the register, fumbled with the gun, leaned over the register counter, and shot Broome a second time.[3] Appellant and Porter's attempt to open the cash register failed. Appellant and Porter left. There is no evidence appellant or Porter asked Broome for money before the shooting.

Three young women arrived as appellant and Porter fled the Hot Spot and jumped into the truck. One of the women ran into the store, found Broome on the floor, and telephoned for emergency services. When the police arrived, Broome was still breathing. He had been shot twice in the head.[4] Broome died at the hospital.

Appellant wrapped Mullinax's shirt around the gun and initially hid it in the woods. He hid his own shirt and Porter's shirt elsewhere. Twelve hours after the shooting, appellant told an employee at another convenience store he was going to the park to shoot basketball.

After his arrest, an investigator asked appellant had Broome done anything to cause appellant to shoot. Appellant responded: "No. We were sitting around in the woods talking about what we were going to do with him,

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[3] Appellant waited eight seconds before firing the second shot.

[4] All the events inside the Hot Spot were recorded on the store's security camera.

and I'm the one that had the gun, and I guess I just snapped."

ISSUES[5]

I. Did the trial court err by refusing to instruct the jury appellant was parole ineligible?

II. Did the trial judge err by granting the State's motion to prohibit both the prosecution and defense from referring to the Bible or using religious references during closing argument?

III. Did the trial judge err by refusing to allow appellant to reopen the record to present evidence on deterrence or, alternatively, for a curative instruction after the solicitor argued the general deterrent effect of the death penalty?

DISCUSSION

I.

Appellant argues, for various reasons, the trial court erred by refusing to instruct the jury he was parole ineligible. We disagree.

After closing arguments, relying on *Simmons v. South Carolina*, 512 U.S. 154 (1994), appellant requested the trial court instruct the jury he would be ineligible for parole. The trial court denied the request.

Thereafter, the trial judge instructed the jury "life imprisonment means until the death of the defendant."

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[5] All issues stem from the sentencing phase of appellant's trial.

He later stated: "[i]n deciding whether to sentence the defendant to death or to life imprisonment, I remind you that death means just what it says, death. Life imprisonment means incarceration of the defendant until his death."

After three and one-half hours of deliberation, the jury returned with the following questions:

> 1. Is there any remote chance for someone convicted of murder to become eligible for parole?
>
> 2. Under what conditions would someone convicted for murder be eligible?

Regarding Question 1, appellant agreed the trial court should instruct the jury "life imprisonment means until the death of the offender" and requested the court read the portion of § 16-3-20(A) which explains no person sentenced to life imprisonment is eligible for parole or any other form of release or credits which would reduce a life sentence. Appellant stipulated Question 2 could not be answered. After the trial judge informed the parties of his intended response to the jury's questions, appellant requested the trial judge delete any reference to parole eligibility.[6]

The trial judge responded to the jury's questions as follows:

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[6] The trial judge stated he would charge the jury as follows: "[y]our consideration is restricted to what sentence to recommend. I will, as trial judge, impose the sentence you recommend. Section 16-3-20 of the South Carolina Code of Laws provides that for the purpose of this section life imprisonment means until the death of the offender. Parole eligibility is not for your consideration."

> Your consideration is restricted to what sentence to recommend. I will remind you that what you recommend is what I will impose as trial judge. Section 16-3-20 of our Code of Laws as applies to this case in the process we're in states that, 'for the purposes of this section life imprisonment means until the death of the offender.' Parole eligibility or ineligibility is not for your consideration.

Appellant excepted stating, "we would renew our objection under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the State and Federal Constitutions." The trial judge noted the exception.

A.

Appellant argues he was entitled to a charge on parole ineligibility after the solicitor placed his future dangerousness in issue. He contends *Simmons* mandates a parole ineligibility instruction and refusal to give the charge violated his right to due process. We disagree.

When the State places the defendant's future dangerousness at issue and the only available alternative sentence to the death penalty is life imprisonment without parole, due process entitles the defendant to inform the jury he is parole ineligible. *Id.; State v. Williams*, 321 S.C. 327, 468 S.E.2d 626 (1996). Due process is violated when the State "raise[s] the specter of [the defendant's] future dangerousness generally, but then thwart[s] all efforts by [the defendant] to demonstrate that, contrary to the prosecutor's intimations, he never would be released on parole and thus, in his view, would not pose a future

danger to society." *Simmons*, 512 U.S. at 165 (1994) (plurality opinion).

Appellant was tried under the new sentencing scheme which became effective on January 1, 1996. S.C. Code Ann. § 16-3-20 (Supp. 1998). Under the new sentencing scheme, a defendant can be sentenced to 1) death, 2) life without the possibility of parole, or 3) a mandatory minimum thirty year sentence. We recently held *Simmons* is inapplicable under the new sentencing scheme because life without the possibility of parole is not the only legally available sentence alternative to death. *State v. Starnes*, Op. No. 25119 (S.C. Sup. Ct. filed May 8, 2000) (Shearouse Adv. Sh. No. 18 at 17).[7] Accordingly, appellant's due process rights were not violated by the trial judge's refusal to instruct the jury appellant was parole ineligible.

Appellant argues *Simmons* mandates a charge on parole ineligibility when the State argues future dangerousness and the *jury's sentencing recommendation* is limited to death or life without the possibility of parole, even though some other sentence is available. We do not read *Simmons* so narrowly. By its own terms, *Simmons* requires the trial judge instruct the jury the defendant is parole ineligible only if no other sentence than death, other than life without the possibility of parole, is *legally available* to

[7] In *Starnes*, we suggested, under the terms of the statute, it is arguable a defendant could be sentenced to more than thirty years and be eligible for parole after service of thirty years. For purposes of this discussion, we assume appellant was parole ineligible.

the defendant. *Simmons*, U.S. at 178 (O'Connor, J., concurring) ("[a]lthough the only alternative sentence to death *under state law* was life imprisonment without the possibility of parole . . . ".) (emphasis added). This interpretation is supported by decisions from other jurisdictions. *Ramdass v. Angelone*, 187 F.3d 396 (4th Cir. 1999) (*Simmons* is inapplicable if, at time of sentencing proceeding, defendant is parole eligible under state law; hence where judgment had yet to be entered for defendant's third murder conviction, defendant was parole eligible under "three strikes" law); *United States v. Flores*, 63 F.3d 1342 (5th Cir. 1995), *cert. denied*, 519 U.S. 825 (1996) (because sentencing guidelines vest district court with discretion to adjust life sentence downward, life sentence without possibility of parole is not only legal sentence other than death which defendant might receive and, therefore *Simmons* is inapplicable); *Allridge v. Scott*, 41 F.3d 213 (5th Cir. 1994), *cert. denied*, 514 U.S. 1108 (1995) (*Simmons* applies where capital defendant is ineligible for parole as a matter of law; *Simmons* does not apply even if it is unlikely defendant would be paroled); *People v. Simpson*, 665 N.E.2d 1228 (Ill.), *cert. denied*, 519 U.S. 982 (1996) (*Simmons* inapplicable where capital defendant is statutorily eligible for a sentence less than natural life imprisonment); *State v. McLaughlin*, 462 S.E.2d 1 (N.C. 1995), *cert. denied*, 516 U.S. 1133 (1996) (*Simmons* inapplicable where alternative to death is not life imprisonment without possibility of parole). At the time appellant's jury began its deliberations, three alternative sentences were available. Since

one of these alternatives to death was not life without the possibility of parole, *Simmons* was inapplicable.[8]

B.

Appellant contends the failure to inform the jury he was parole ineligible violated the Eighth Amendment prohibition against the arbitrary infliction of the death penalty.[9] He specifically argues the failure to inform the jury of his parole ineligibility prevented him from presenting mitigating evidence in support of a sentence less than death and diminished the reliability of the jury's sentencing decision. In light of the new sentencing statute, he asks the Court to reconsider its policy prohibiting

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[8] The dissent contends the cases cited herein are inapposite. Although the sentencing alternatives under consideration in each case referenced above may differ from those in South Carolina's new capital sentencing statute, each of the cases support the conclusion due process requires the jury be informed the capital defendant is parole ineligible where the only sentencing alternatives are death or life without the possibility of parole and the prosecution argues the defendant's future dangerousness. Excepting *Flores*, in each of the cases cited above, the capital defendant was parole eligible, therefore, due process did not mandate the jury be informed the defendant was parole ineligible. In *Flores*, although parole ineligible, the federal district judge could have departed from the sentencing guidelines and imposed a sentence less than life imprisonment. Accordingly, due process did not require the jury be informed Flores was parole ineligible. As fully discussed in *State v. Starnes, supra*, because death and life without the possibility of parole are not the only sentence alternatives under the new sentencing statute, due process does not require the jury be informed the defendant is parole ineligible.

[9] U.S. Const. amend. VIII.

the trial judge from informing the jury a capital defendant is parole ineligible.

Initially, we note this issue is not properly preserved for appellate consideration. After the trial judge responded to the jury's question, appellant stated he excepted "on the basis of the Eighth Amendment." He offered no explanation or argument in support of the exception. Appellant's objection to the supplemental instruction is simply too vague for the Court to review. *State v. Bailey*, 253 S.C. 304, 170 S.E.2d 376 (1969) (general objection leaves nothing for Court to review). Clearly, appellant never argued, as he does now, that the Eighth Amendment requires a charge on parole ineligibility as mitigating evidence and to ensure the reliability of the sentence imposed. *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996) (an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge).

In any event, the Eighth Amendment requires that a death sentence not be imposed arbitrarily. *Jones v. United States*, 527 U.S. 373 (1999). It prohibits the State from limiting the sentencer's consideration of "any relevant mitigating evidence" which could cause the jury to decline to impose the death penalty. *Payne v. Tennessee*, 501 U.S. 808, 822 (1991), *citing Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982). The United States Supreme Court has "deferred to the State's choice of substantive factors relevant to the penalty determination." *California v. Ramos*, 463 U.S. 992, 1001 (1983). Whether parole eligibility is relevant to the sentencing determination is a matter of state law. *Id.; see Simmons v. South Carolina*, 512 U.S. 154,

176 (O'Connor, J., concurring) ("[t]he decision whether or not to inform the jury of the possibility of early release is generally left to the States.").[10]

In South Carolina, parole eligibility is not relevant to a jury's sentencing considerations. *State v. Young*, 319 S.C. 33, 459 S.E.2d 84 (1995) (defendant who was parole eligible after service of thirty years not entitled to charge on parole eligibility). The refusal to inform the jury of the capital defendant's parole eligibility does not violate the Eighth Amendment. *Id.*

Although we have never explicitly ruled whether the Eighth Amendment entitles a capital defendant to a charge informing the jury he is parole *in*eligible, precedent suggests no such instruction is required.[11] In *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (Chandler, J., concurring), the Court held the defendant who was parole ineligible due to a prior conviction for a violent crime was not entitled to a charge informing the jury of his parole ineligibility. In *State v. Southerland*, 316 S.C. 377, 447 S.E.2d 862 (1994), *cert. denied* 513 U.S. 1166 (1995), *overruled on other grounds State v. Chapman*, 317 S.C. 302, 454 S.E.2d 317 (1995), we concluded there was no Eighth Amendment violation where the trial judge did not instruct the jury the defendant was parole ineligible but

[10] *O'Dell v. Netherland*, 521 U.S. 151, 165 (1997) ("[i]n *Simmons*, the Court carved out an exception to the general rule described in *Ramos* by, for the first time ever, requiring that a defendant be allowed to inform the jury of the postsentencing legal eventualities.").

[11] Appellant agrees there has been a blanket prohibition against any instruction on parole eligibility or ineligibility.

defense counsel argued "life imprisonment" means the defendant will never be released from prison. In *Simmons v. South Carolina*, 512 U.S. 154 (1994), the United States Supreme Court declined to hold the Eighth Amendment requires the jury to be informed a capital defendant is parole ineligible.

Relying on *Skipper v. South Carolina*, 476 U.S. 1 (1986), appellant asserts parole ineligibility is a mitigating circumstance of which the jury should have been informed. We disagree.

As noted above, the Eighth Amendment prohibits the State from limiting the sentencer's consideration of "any relevant mitigating evidence." *Payne v. Tennessee*, 501 U.S. 808, 822 (1991). For purposes of the Eighth Amendment, mitigating evidence is "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Skipper v. South Carolina*, 476 U.S. 1, 4, *citing Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *see State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996) (mitigating circumstances are details specific to the character of the defendant on trial and/or the circumstances of the crime he committed which are considered in order to reduce the degree of his moral culpability or guilt). In *Skipper*, the Supreme Court held evidence of the defendant's good behavior while in jail awaiting trial was potentially mitigating because it indicated he would not pose a danger in the future. Accordingly, excluding evidence of the defendant's future adaptability violated the Eighth Amendment.

Unlike a defendant's behavior in prison, parole ineligibility is not an aspect of a defendant's character or record. Parole eligibility or ineligibility is a legislative determination; it is not mitigating evidence. *See State v. Patterson*, 299 S.C. 280, 384 S.E.2d 699 (1989), *vacated on other grounds* 493 U.S. 1013 (1990) (information regarding requirements for parole eligibility is not mitigating evidence); *State v. Matthews*, 296 S.C. 379, 373 S.E.2d 587 (1988), *cert. denied*, 489 U.S. 1091 (1989) (punishment for a crime cannot serve as a mitigating sentencing consideration); *see also State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996) (the general effect of capital punishment as a deterrent to crime is not a mitigating circumstance). The Eighth Amendment is not violated by refusing to inform the jury a capital defendant is parole ineligible.

Appellant asserts since all capital defendants are now parole ineligible, the Court should permit juries to be informed of parole ineligibility. He claims providing juries with accurate information on parole ineligibility will eliminate prejudicial misinformation juries hold concerning parole eligibility and produce more reliable sentencing determinations. We disagree.

Traditionally, in South Carolina it is the jury's duty and responsibility in the sentencing phase of a capital trial to impose a punishment authorized by law in consideration of the circumstances of the crime and the characteristics of the individual defendant. The jury is not authorized to legislate a plan of punishment. *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619, *cert. denied* 467 U.S. 1265 (1984); *see State v. Atkinson*, 253 S.C. 531, 172 S.E.2d 111 (1970), *citing State v. White*, 142 A.2d 65, 76 (N.J. 1958) ("the Legislature committed to the jury the responsibility

to determine in the first instance whether punishment should be life or death. It charged another agency with the responsibility of deciding how a life sentence shall be executed. The jurors perform their task completely when they decide the matter assigned to them upon the evidence before them. What happens thereafter is no concern of theirs."), *overruled on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). The jury's duty is the same under the new sentencing statute. While a defendant's parole ineligibility could affect the jury's decision, it nonetheless remains an irrelevant factor which the jury should not consider. Affirmatively mentioning an irrelevant factor would undermine the jury's decisionmaking process and result in a decision which is less, rather than more, reliable. As a matter of policy, we maintain it is inappropriate to inform the jury the capital defendant is parole ineligible. The Eighth Amendment does not compel a different result. *Jones v. United States*, 527 U.S. 373, ___, 119 S.Ct. 2090, 2099 (1999) (a death sentence is not arbitrary within the meaning of the Eighth Amendment "if the jury is not given any bit of information that might possibly influence the individual juror's voting behavior.").

C.

Appellant argues the trial judge's supplemental instruction was erroneous. He contends 1) in responding to the jury's questions, the trial judge should have informed the jury he was parole ineligible, 2) the trial judge's admonition, "parole eligibility or ineligibility is not for your consideration," incorrectly suggested he was parole eligible, and 3) the trial judge erred by refusing to

read that portion of the sentencing statute which referred to parole ineligibility. We disagree.

1.

As noted above, parole eligibility or ineligibility is not relevant to a capital jury's sentencing considerations and the issue of parole should not be injected into the jury's deliberations. *State v. Ard*, 332 S.C. 370, 505 S.E.2d 328 (1998); *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). When a *jury inquires* about parole, the trial court should instruct the jury it shall not consider parole eligibility in reaching its decision and the terms "life imprisonment" and "death penalty" should be understood in their ordinary and plain meaning. *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339 (1985), *overruled on other groundsState v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).[12]

In keeping with *Norris*, the trial judge's supplemental instruction properly told the jury not to consider parole eligibility or ineligibility. Although *Norris* was decided prior to the new sentencing statute, we find no reason to require a different response when the jury inquires about parole.

Moreover, as noted above, three potential sentences were available: 1) death, 2) life imprisonment, or 3) a

[12] In *Ard* we held the trial judge's erroneous mention of parole was harmless. To the extent *Ard* suggests the trial judge should charge the jury on parole eligibility if requested by the defendant, it is overruled. We note *Ard* was decided eight months after the present case was tried.

mandatory minimum thirty year sentence. Appellant was not eligible for parole under any of these sentences.[13] Nonetheless, as suggested by appellant, by asking for information on parole, the jury was attempting to ascertain the length of time appellant would realistically spend in prison if sentenced to life imprisonment. Informing the jury appellant was parole ineligible when, unbeknownst to the jury, he faced a possible sentence of thirty years imprisonment after which he would be unconditionally released would not have fairly responded to the jury's inquiry.

2.

Furthermore, contrary to appellant's argument, the trial judge's admonition, "parole eligibility or ineligibility is not for your consideration," did not suggest appellant was parole *eligible*. Unlike the admonitions in *Simmons v. South Carolina*, 512 U.S. 154 (1994), "you are not to consider parole" and parole "is not a proper issue for your consideration," the instruction here specifically informed the jury not to consider either parole eligibility or ineligibility and, therefore, did not imply appellant was parole eligible.

3.

Finally, in response to the jury's questions, appellant requested the trial judge read that portion of the sentencing statute highlighted below:

[13] *But see* footnote 7.

A person who is convicted of or pleads guilty to murder must be punished by death, imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. **If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, 'life imprisonment' means until the death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section.** No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section.

Section 16-3-20(A) (Supp. 1998).

We find no error or prejudice from the trial judge's refusal to read the highlighted portion of the statute. Again, neither parole eligibility nor parole ineligibility are proper considerations for the jury. *State v. Ard*, 332 S.C. 370, 505 S.E.2d 328 (1998); *State v. Torrence*, 305 S.C.

45, 406 S.E.2d 315 (1991). Furthermore, appellant's suggestion that providing the jury with the highlighted language would promote "truth-in-sentencing" is tenuous. The highlighted text provides the jury with only those portions of the sentencing statute which appellant deems favorable but excludes any reference to other less favorable sentencing options.

We conclude the supplemental instruction was appropriate.

II.

Appellant argues he was deprived of his right to make religious arguments to the jury. We disagree.

Over appellant's objection, the trial judge granted the State's motion to prohibit references to the Bible or religion during closing argument by both the prosecution and defense. Appellant proffered several religious arguments he had considered including in his closing argument.

In his closing argument, appellant stated:

> There's a story about a woman who broke the law a long, long, long time ago. Before we had electricity, before we had lethal injection, we still had the death penalty. There was a time that she had been caught, she was caught for breaking the law, and the people in her community gathered around her, and they were going to kill her for what she had done. They had the objects they were going to use to kill her in their hands, and she stood before them. Somebody walked in and said 'I'm not denying that what she did was wrong, this isn't about what she did was wrong,

> this is about what statement are you going to make about being confronted with this.'
>
> The story that I referenced, a very great man discussed with them about not killing the woman, and they didn't.

We find no error in the trial judge's ruling. Previously, we have held there is no fundamental unfairness when the trial judge precludes the solicitor and the defense from arguing about God or religion. *State v. Patterson*, 324 S.C. 5, 482 S.E.2d 760, *cert. denied* 522 U.S. ___, 118 S.Ct. 146 (1997). In any event, the record clearly demonstrates appellant was not prejudiced by the trial judge's ruling. Although he was not permitted to make all of his religious arguments, appellant conveyed the Biblical story of Jesus and the adulterous woman. *State v. Bennett*, 328 S.C. 251, 493 S.E.2d 845 (1997) (capital defendant was not prejudiced by sustained objection to his religious argument where record indicated he made the argument nonetheless). The trial judge did not abuse his discretion in granting the State's motion to prohibit references to the Bible or religion during both the prosecution and defense closing arguments. *See State v. Patrick*, 289 S.C. 301, 345 S.E.2d 481 (1986)[14] (trial judge is vested with broad discretion in dealing with the range and propriety of closing arguments and ordinarily his rulings on such matters will not be disturbed).

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[14] *Overruled on other grounds Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *State v. Casey*, 305 S.C. 445, 409 S.E.2d 391 (1991).

III.

In the penalty phase closing argument, the solicitor argued the death penalty deters others from committing murder. Thereafter, appellant requested the trial judge either reopen the case to allow him to present statistical evidence the death penalty does not deter murder or, alternatively, to instruct the jury to disregard the solicitor's comments regarding general deterrence. The trial judge denied both requests. Appellant argues this was error. We disagree.

In South Carolina, our case law is abundantly clear: while both the prosecution and defense may argue their respective opinions regarding the general deterrent effect of the death penalty, neither may present evidence supporting their views. *State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996).[15] Accordingly, the trial judge did not err by refusing appellant's request to reopen the record for the purpose of presenting evidence on the deterrent effect of the death penalty.

Furthermore, we have never directly held it is reversible error to refuse to give such a curative instruction where the solicitor argues general deterrence. *See State v. McWee*, 322 S.C. 387, 472 S.E.2d 235 (1996), *cert. denied* 519 U.S. ___, 117 S.Ct. 695 (1997) (where solicitor argued specific deterrence, requested charge on general deterrence was not required); *State v. Longworth*, 313 S.C. 360,

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[15] Because the General Assembly has approved the propriety of capital punishment, evidence attempting to establish its effectiveness or ineffectiveness as an instrument of deterrence is irrelevant.

438 S.E.2d 219 (1993), *cert. denied* 513 U.S. 831 (1994) (where solicitor did not argue general deterrence, refusal to charge general deterrence need not be considered); *State v. Patterson*, 285 S.C. 5, 327 S.E.2d 650 (1984), *cert. denied* 471 U.S. 1036 (1985), *overruled on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (refusal to charge general deterrence is properly refused as function of jury is to determine appropriate penalty for present charge). In fact, our cases have repeatedly allowed the solicitor to argue his opinion regarding the deterrent effect of capital punishment. *State v. Truesdale*, 301 S.C. 546, 393 S.E.2d 168, *cert. denied* 498 U.S. 1074 (1990); *State v. Jones*, 298 S.C. 118, 378 S.E.2d 594 (1989); *State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982), *cert. denied* 462 U.S. 1124 (1983), *overruled on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Since argument on general deterrence is permitted, it would be illogical to instruct the jury it may not consider the effect of its sentence on others.

Finally, in light of his freedom to argue capital punishment does not discourage others from committing murder, appellant's due process was not violated by the trial judge's denial of his request to present evidence on general deterrence or charge the jury not to consider the deterrent effect of the death penalty.

PROPORTIONALITY REVIEW

After reviewing the entire record, we conclude the death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the jury's finding of a statutory aggravating circumstance is supported by the

evidence. *See* S.C. Code Ann. § 16-3-25 (1985). Further, we hold the death penalty is neither excessive nor disproportionate to that imposed in similar cases. *See State v. Hughes*, 328 S.C. 146, 493 S.E.2d 821 (1997), *cert. denied*, 523 U.S. ___, 118 S.Ct. 1674 (1998); *State v. Patterson*, 324 S.C. 5, 482 S.E.2d 760, *cert. denied*, 522 U.S. ___, 118 S.Ct. 146 (1997); *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57, *cert. denied*, 520 U.S. ___, 117 S.Ct. 2460 (1996); *State v. Humphries*, 325 S.C. 28, 479 S.E.2d 52, *cert. denied*, 520 U.S. ___, 117 S.Ct. 2441 (1996); *State v. McWee*, 322 S.C. 387, 472 S.E.2d 235 (1996), *cert. denied*, 519 U.S. ___, 117 S.Ct. 695 (1997); *State v. Sims*, 304 S.C. 409, 405 S.E.2d 377 (1991), *cert. denied*, 502 U.S. 1103 (1992).

AFFIRMED.

MOORE, WALLER, JJ., and Acting Justice Thomas C. Huff, concur. FINNEY, C.J., dissenting in a separate opinion.

FINNEY, C.J.: I respectfully dissent, and would reverse and remand for a new sentencing proceeding.

Under the 1996 amendments to S.C. Code Ann. § 16-3-20, all capital defendants face one of three sentences:

(1) death; or

(2) life in prison until death; or

(3) unconditional release after service of a minimum term of thirty years, with no possibility of parole.[1]

Appellant contends that since he was parole ineligible as a matter of state law, the jury was entitled to be charged this fact when they inquired. I agree.

The majority deems the holding in *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2178, 129 L.Ed.2d 133 (1994), inapplicable because appellant's sentencing options were not limited to death or life without possibility of parole, and cites a number of cases in support of this proposition. In all the cited cases except one, however, the defendant's sentencing possibilities included one in which he would be parole eligible. The only case in

[1] In this opinion and in *State v. Starnes*, Op. No. 25119 (S.C. Sup. Ct. filed May 8, 2000), the Court has avoided directly deciding the parole eligibility status of a capital defendant who receives a term of years sentence. In my opinion, we must decide this question today in order to address the jury charge issues raised by appellant. The murder statute is clear as to certain defendants: "No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole . . . or any other credits which would reduce the mandatory minimum term of imprisonment for thirty years required by this section." § 16-3-20(A) (Supp. 1999). Since the murder statute is silent as to the parole eligibility of defendants receiving a sentence in excess of the mandatory minimum, the general rule controls. Under § 16-1-10(d) (Supp. 1999), murder is exempt from the classification system, and under § 24-13-100 (Supp. 1999), persons convicted of exempt offenses are ineligible for parole. Thus, although a capital defendant may receive a sentence of a term of years, he is ineligible for parole whatever the duration of that term.

which the defendant did not face a potential parolable sentence was *United States v. Flores*, 63 F.3d 1342 (5th Cir. 1995). *Flores* involves a federal conviction, and parole has been abolished in the federal system. It is inapposite to the present South Carolina sentencing scheme, as are all the other cases cited. While I concede that *Simmons* does not directly control this case[2], the overriding principle to be drawn from that decision is that due process is violated when a jury's speculative misunderstanding about a capital defendant's parole eligibility is allowed to go uncorrected. Here, the jury's inquiry prompted a misleading response which suggested parole was a possibility. In my opinion, due process mandates reversal.

Further, if the decision whether to inform juries which inquire about parole eligibility is simply one of policy, as the majority suggests in Part I C, then why not adopt a policy which gives the jurors the simply [sic] truth: no parole. The majority acknowledges, as it must,[3] that parole considerations "could" affect a jury's sentencing decision,[4] but then deems it "irrelevant" and denigrates its importance as "[a] bit of information that might

[2] We are not concerned with whether a *Simmons* charge was warranted at the initial charge to the jury since future dangerousness was not an issue, but rather with the procedure to be followed when a capital jury inquires about parole.

[3] Given the regularity with which capital juries inquire about parole, we cannot deny its role in sentencing.

[4] See Bowers, Vandiver & Dugan, *A New Look at Public Opinion On Capital Punishment: What Citizens and Legislators Prefer*, 22 Am.J.Crim.L. 77 (1994).

possibly influence the individual juror's voting behavior." The specter of parole haunts every capital sentencing proceeding in this State, and I cannot understand why, given the simplicity of our new sentencing scheme in which no capital defendant is ever parole eligible, we would make a policy decision prohibiting the dissemination of the truth.

Of course, I would not stop with a charge that the defendant was not parole eligible, for that is only half the truth. I would tell the jury that if no aggravating circumstance is found, the defendant faces a minimum of thirty years without possibility of early release, but that if aggravating circumstances are found, then the alternatives are death or life in prison until death.

For these reasons, and with instructions that henceforth juries which inquire shall be charged the truth about sentencing, I would reverse and remand for a new sentencing proceeding in this matter.

The Supreme Court of South Carolina

The State, Respondent,

v.

Wesley Aaron Shafer, Jr., Petitioner.

ORDER

This Court recently affirmed petitioner's murder conviction and his death sentence. *State v. Shafer,* Op. No. 25120 (S.C. Sup. Ct. filed May 8, 2000) (Shearouse Adv. Sh. No. 18 at 35). Petitioner has now filed a consent motion seeking a stay of remittitur and a stay of execution to allow him to file a petition for a writ of certiorari with the United States Supreme Court. Respondent agrees that petitioner is entitled to a stay of execution since petitioner's proposed questions are appropriate for inclusion in a petition for a writ of certiorari to the United States Supreme Court. *In re Stays of Execution in Capital Cases,* 321 S.C. 544, 471 S.E.2d 140 (1996).

Petitioner's request for a stay of remittitur is denied. Petitioner's request for a stay of execution is granted. The stay of execution shall remain in effect to the extent provided by this Court in *In re Stays of Execution in Capital Cases.*

IT IS SO ORDERED.

/s/ James E. Moore A.C.J.

/s/ John H. Waller Jr. J.

/s/ Illegible J.

/s/ Illegible J.

Toal, C.J., not participating

Columbia, South Carolina

June 6, 2000

Supreme Court of the United States

SHAFER, WESLEY A. V. SOUTH CAROLINA.

No. 00-5250.

Sep. 26, 2000.

The motion of petitioner for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted limited to Question 1 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29, 2000. Rule 29.2 does not apply.
